Deconstructing Scopes

Unraveling the Mythology of the World's Most Famous Trial

A Symposium in Celebration of the 75th Anniversary of Bryan College and the 80th Anniversary of the Scopes Trial

March 20-21, 2006

Christ Above All

BRYAN
COLLEGE

75th Anniversary Celebration

The excerpts in this workbook were compiled by Todd Charles Wood.

The complete papers from which these excerpts were taken will be published in book form. If you would like to obtain a copy of the book, send your name and address to:

Stephanie Mace
P.O. Box 7605
Bryan College
Dayton, TN 37321

info@bryancore.org

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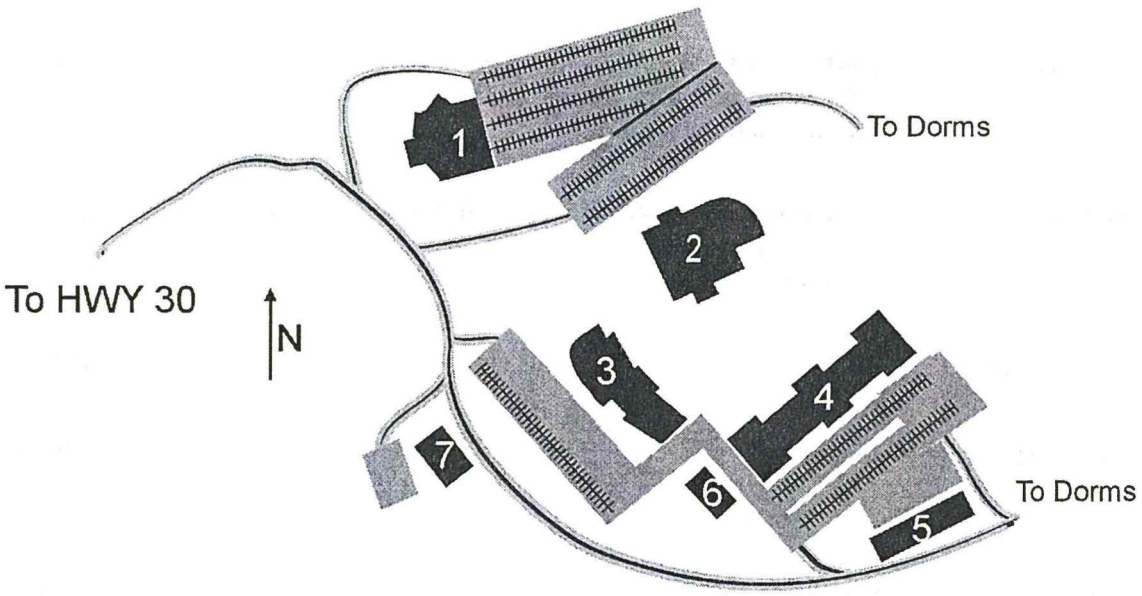
Campus Map



1. Rudd Auditorium
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1. Antievolutionism in America Leading to the Scopes Trial

Ronald L. Numbers

I. *Vestiges of the Natural History of Creation*

Few Americans knew anything about organic evolution before 1844, when an anonymous British author, later identified as the Edinburgh publisher Robert Chambers (1802-1871), wove together threads from the nebular hypothesis (a developmental account of the origin of the solar system), historical geology, and the evolutionary ideas of Jean-Baptiste Lamarck (1744-1829) into a sensational little book called *Vestiges of the Natural History of Creation*. It created a storm on both sides of the Atlantic and brought, in the words of one historian, "an evolutionary vision of the universe into the heart of everyday life."

Although the *Journal of American Science*, edited by the pious Yale naturalist Benjamin Silliman (1779-1864), "strongly recommended" *Vestiges* as "novel and interesting . . . with many bold conceptions and startling opinions," the majority in the American scientific community found *Vestiges* scientifically and theologically offensive. Even Silliman quickly backed away from his implied endorsement, assuring one acquaintance that he had "always opposed . . . Lamarck's absurd theory of transmutation" and had always maintained "that every new organized being or pair of beings was the direct result of creative power and that there is no inherent tendency in matter to produce organized forms, much less life and reason."

A handful of American naturalists, including Samuel Haldemann (1812-1880), Joseph Leidy (1823-1891), and the Rogers brothers, Henry Darwin (1808-1866) and William Barton (1804-1882), warmly welcomed the book. Henry Rogers thought that it contained the "loftiest speculative views in Astronomy and Geology and Natural History, and singularly accords with views sketched by me at times in my lectures." Such openness may have cost him a coveted job at Harvard when Gray killed his candidacy by branding him a "Lamarckian Vestiges" heretic. Out on the Illinois frontier a young lawyer named Abraham Lincoln (1809-1865) devoured the book and "became a warm advocate of the doctrine," while back East an accused murderer blamed *Vestiges* and Voltaire for turning him into an infidel. (The jury found him not guilty by reason of insanity.)

II. Darwinism and Anti-Darwinism

Fifteen years after the appearance of *Vestiges* Charles Darwin (1809-1882) published his landmark study of the *Origin of Species*, which promoted natural selection as the primary means of speciation. Although Darwin's principal goal was "to overthrow the dogma of separate creations," he invoked at least one creative act for the purpose of getting life going and allowed for the possibility of several more interventions. "I believe that animals have descended from at most only four or five progenitors, and plants from an equal or lesser number," he wrote in a widely quoted passage, adding that analogy would lead him to believe "that probably all the organic beings which have ever lived on this earth have descended from some one primordial form, into which life was first breathed." Darwin quickly came to regret this use of "Pentateuchal" language, and within a few years he had repudiated all suggestions of divinely guided change.

The advocates of special creation commonly refrained from explaining exactly how creation had occurred. In the eyes of their critics such reluctance, along with the inevitable appeal to the supernatural, disqualified creation as a proper scientific explanation. As early as 1838 Darwin had concluded that attributing the structure of animals to "the *will* of the Diety" was "no explanation—it *has not the character of a physical* law & is therefore utterly useless."

Eager for a scientific (that is, natural) explanation of origins and impressed by the cogency of Darwin's argument, the majority of America's leading naturalists within fifteen years or so embraced some kind of evolution, though few attached as much weight to natural selection as did Darwin.

Until his death in 1873 Louis Agassiz remained Darwin's leading American critic—but not because of any fondness for the Bible. This minister's son had long ago left the Calvinism of his childhood for liberal Unitarianism. Regarded in some quarters as an "infidel," he openly scoffed at the supposition that fossils represented "the wrecks of the Mosaic deluge" and dismissed the story of Adam and Eve as an "absurdity."

After the passing of Agassiz the most prominent antievolutionist in the American scientific community—according to one exaggerated report, the only "working naturalist of repute in the United States . . . that is not an evolutionist" —was the Princeton geographer-geologist Arnold Guyot (1807-1884), who had followed Agassiz over from Switzerland in the late 1840s. A devout Presbyterian, Guyot operated within a loosely biblical framework but experienced little difficulty accommodating the antiquity of the earth, the progression of the fossil record, and a local Noachian deluge.

Even better known than Guyot for opposing evolution was the distinguished Canadian geologist John William Dawson, the only person to serve as president of both the American Association for the Advancement of Science and the British Association for the Advancement of Science. A protégé of Lyell's, Dawson for decades presided over McGill College in Montreal. Never a biblical literalist, the Presbyterian Dawson readily granted that the earth was of great antiquity.

There was another non-Darwinian geologist of repute: J. Peter Lesley (1819-1903), who had trained for the Presbyterian ministry at Princeton Theological Seminary and pastored a Congregational church before losing his ministerial license for harboring "infidel" sentiments and "denying the Inspiration of the Scriptures." Although he regarded Genesis and geology as "irreconcilable enemies" and for a time acknowledged the simian origins of humans, he generally insisted on keeping evolution "*within the regions of variety.*" Before admitting more extensive development—of genus, family, or class—he wanted to observe "nature in the very act of exchanging one species for another."

In 1872, less than thirteen years after the appearance of the *Origin of Species*, the paleontologist Edward Drinker Cope (1840-1897) observed that "the modern theory of evolution has been spread everywhere with unexampled rapidity, thanks to our means of printing and transportation. It has met with remarkably rapid acceptance by those best qualified to judge of its merits, viz., the zoologists and botanists." Evolution was, he declared, an "ascertained fact." Just before his death the next year Agassiz ruefully conceded that the idea of organic development had won "universal acceptance" within the scientific community. The disappointed antievolutionist may have exaggerated the extent of the Darwinian victory, but he was not mistaken in believing that the tide of scientific opinion had turned decisively against the creationist views he so fervently held.

III. Antievolution in the Churches

As long as the scientific community remained skeptical about the merits of Darwinism, theologians and ministers felt little need to take a stand, confident that speculations about monkeys becoming men would never be taken seriously as science. By the mid-1870s, however, as more and more American scientists abandoned special creation, many clerics were beginning to feel that they could no longer ignore the issue. Although some liberal Protestants sought ways to harmonize their doctrinal beliefs and their understanding of the Bible with evolution, often viewing evolution simply as God's method of creation, most religious leaders rejected evolution, especially of humans, or remained silent on the subject.

The most vocal—and influential—of the theological critics of evolution was the Presbyterian Charles Hodge (1797-1878), longtime professor at the Princeton Theological Seminary, editor of the widely read *Princeton Review*, and author of a weighty *Systematic Theology*. Since the appearance of *Vestiges*, the scientifically literate Hodge had carefully monitored theories of organic development. Hodge insisted that Darwin's theory was essentially atheistic, because it removed God from the work of creation. It was also, in Hodge's opinion, antibiblical, because it contradicted the statements in Genesis that "man was created in the image of God" and that "each species was specially created"—and unscientific, because instead of dealing with the facts and laws of nature in Baconian fashion, it offered only unverifiable probabilities.

Most theological conservatives, like Hodge, viewed Darwinism as erroneous, if not downright dangerous. They feared that the notion of "might makes right" would undermine Christian morality and that tracing human genealogy back to apes would invalidate the concept of humans being created in the image of God. The pedigree alleged by Darwin, complained one outraged Christian, "tears the crown from our heads; it treats us as bastards and not sons, and reveals the degrading fact that man in his best estate—even Mr. Darwin—is but a civilized, dressed up, educated monkey, who has lost his tail."

As long as discussions of biological development remained confined mostly to scholarly circles, Christians who objected to evolution on biblical grounds saw little reason to create a fuss. However, as the debate spilled over into the public arena during the 1880s and 1890s, Christian antievolutionists grew increasingly alarmed. "When these vague speculations, scattered to the four winds by the million-tongued press, are caught up by ignorant and untrained men," warned one concerned premillennialist in 1889, "it is time for earnest Christian men to call a halt."

Not coincidentally, one of the first organized efforts to suppress the teaching of evolution occurred in the mid-to-late 1880s, when Columbia Theological Seminary, a Presbyterian institution in South Carolina, silenced the scientist-cleric James Woodrow (1828-1907), a former student of Agassiz's who held the Perkins Professorship of Natural Science in Connexion with Revealed Religion. Although Woodrow had come to believe that divinely guided evolution had produced Adam's body, he insisted that his soul—and his wife, Eve—had been "immediately created." When the seminary trustees met in September, 1884, to respond to the developing controversy, they voted eight to three to back Woodrow on the grounds that "the Scriptures, while full and clear in asserting the fact of creation, are silent as to its mode." This decision inflamed Woodrow's opponents, who quickly succeeded in reconstituting the board and obtaining a call for Woodrow's resignation. When he declined, the board fired him.

The Woodrow controversy illustrates the extent to which antievolutionists focused on the evolution of *humans*. "Neither party," declared one participant, "denies that descent with modification is probably the law of the successive appearances of the *animal* tribes on this globe from the beginning until we come down to man. . . . We differ only upon one point, viz., the creation of the body of Adam." Another writer noted the same tendency to distinguish between animal and human evolution: "The point of discussion is . . . not Evolution in general. For life below man this is conceded generally, and one newspaper pronounces it 'harmless.' The controversy begins when the doctrine is applied to man."

IV. Fundamentalism

By the early 1890s evolution had won such widespread support among the Protestant clergy that, according to one Methodist, no self-respecting seminary could be regarded as complete "without a course of lectures on the consistency of Evolution with theistic philosophy." Now and then, he conceded, "some theological Rip van Winkle attempts the old Sinaitic thunders in denunciation of the essential atheism of evolution; but his utterances are regarded by his brethren in the church, not with sympathy, but with amusement or mortification." The most notable of the Methodist Rip van Winkles was Luther T. Townsend (1838-1922), sometime professor at Boston Theological Seminary. Although Townsend defended the first chapters of Genesis as "a simple, straight-forward narrative of the facts as they actually occurred," he accommodated the findings of geology by resorting to the gap theory. This allowed him to interpose "vast geological epochs" between the original creation of heaven and earth and the Edenic restoration, at which time "in six literal days, and in the order given in the Bible, the Creator brought the world out of the chaos of the glacial wreck, made it habitable, created modern flora and fauna and gave them life and power to propagate themselves until the end of time."

Townsend's effectiveness as a critic of evolution led to his being considered as an appropriate candidate to write on the subject for *The Fundamentals* (1910-1915), the series of booklets that launched the fundamentalist movement. But the editors eventually selected the more scientifically qualified George Frederick Wright (1838-1921). According to Wright's paraphrase of Darwin's views, "The Creator first breathed life into one, or more probably, four or five, distinct forms," after which a process combining miraculous variations and natural selection split each "order" into families, genera, and species. Wright thought the appearance of humans might legitimately remain outside the evolutionary process, writing that "the miraculous creation of man might no more disprove the general theory of natural selection than an ordinary miracle of Christ would disprove the general reign of natural law." A spiritual crisis over biblical criticism in the early 1890s prompted Wright to reconsider his earlier endorsement of evolution. He

consequently repudiated his earlier belief that Genesis was merely a protest against polytheism and embraced a day-age interpretation of the days of Genesis. In his contribution to *The Fundamentals* on "The Passing of Evolution" Wright stressed the special creation of the earliest forms of plants, animals, and, most important, humans. Man, he wrote, differed so greatly from the higher animals, it was "necessary to suppose the he came into existence as the Bible represents, *by the special creation of a single pair*, from whom all the varieties of the race have sprung."

Until the early twentieth century virtually all of the critics of Darwinism accepted the paleontological evidence for the antiquity of life on earth. The first fundamentalist to challenge this consensus came from the scientifically self-trained Seventh-day Adventist George McCready Price (1870-1963). As a faithful Adventist, Price accepted the divine authority of the prophetess Ellen G. White (1827-1915), who in 1864 claimed that God had shown her in a vision the actual creation of the world. During this out-of-body experience she had seen "that the first week, in which God performed the work of creation in six days and rested on the seventh day, was just like every other week." According to White, "the infidel supposition, that the events of the first week required seven vast, indefinite periods for their accomplishment, strikes directly at the foundation of the Sabbath of the fourth commandment."

Convinced that most of the evidence for geological ages could be explained by Noah's Flood, Price wrote *Outlines of Modern Christianity and Modern Science* (1902), which he liked to call "the first Fundamentalist book." In 1906 he brought out a slim volume entitled *Illogical Geology: The Weakest Point in the Evolution Theory*, in which he confidently offered a $1,000 reward "to any who will, in the face of the facts here presented, show me how to prove that one kind of fossil is older than another." Essentially, he argued that Darwinism rested "logically and historically on the succession of life idea as taught by geology," and that "if this succession of life is not an actual scientific fact, then Darwinism . . . is a most gigantic hoax." Throughout his life Price saved his sharpest barbs for uniformitarian geology, since, in his opinion, "the modern theory of evolution is about 95% due to the geology of Lyell and only about 5% to the biology of Darwin."

Although not unknown in fundamentalist circles before the early 1920s, Price did not begin attracting widespread national attention until then. In 1923 he published his *New Geology*, the most systematic and comprehensive of his two dozen or so books. Despite attacks from the scientific establishment, Price's influence among non-Adventist fundamentalists grew so rapidly that by the mid-1920s the editor of *Science* could accurately describe Price as "the principal scientific authority of the Fundamentalists."

Although virtually every prominent fundamentalist praised Price for his attacks on evolution, not one of them in the years before the Scopes trial abandoned the by-now conventional day-age and gap interpretations of Genesis and joined Price in limiting the history of life on earth to about 6,000 years and attributing the fossils to the work of the Noah's flood. William Bell Riley (1861-1947), the Baptist preacher who founded the World's Christian Fundamentals Association in 1919, remained strongly attached to the day-age theory, as did William Jennings Bryan (1860-1925), who represented Riley's organization in Dayton, Tennessee. The immensely popular *Scofield Reference Bible* (1909), a fundamentalist favorite, presented the gap theory (also known as the ruin-and-restoration model) as gospel truth.

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2. Monkey in the Middle: The State of Tennessee vs. John Thomas Scopes

Directed by Gale Johnson

The Cast

The Accused

John Thomas Scopes ..... Benjamin Johnson

The Prosecution

William Jennings Bryan ..... Raymond Legg
Attorney General A.T. Stewart ..... David Fouts
B.G. McKenzie ..... Art Cotton
J.G. McKenzie ..... Robbie Brock

The Defense

Clarence Darrow ..... Tony McCuiston
Dudley Field Malone ..... Ed McNair
Arthur Garfield Hays ..... Roger Gupton

The Judge

The Honorable J.T. Raulston ..... Ron Petitte

Synopsis of Scenes

Scene 1: Thursday, July 16, 1925 - The prosecution and defense battle over scientific testimony.

Scene 2: Friday, July 17, 1925 and Monday, July 20, 1925 - Judge Raulston excludes testimony by scientists and Bryan takes the stand.

Scene 3: Tuesday, July 21, 1925 - Scopes is convicted and sentenced.

Historical Background on the Scopes Trial

It was January 21, 1925. State Rep. John Washington Butler introduced to the Tennessee House of Representatives House Bill No. 185 (the "Butler Act") which would make it "unlawful for any teacher in any of the ... public schools of the state ... to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals." On Friday, March 13, 1925, the Tennessee Senate, by a vote of 24-6, concurred with the House and sent the bill to Gov. Austin Peay for his signature. The Butler Act was signed into law March 21.

In 1924, William Jennings Bryan, former Secretary of State, Democratic party leader, and Chautauqua orator, had lectured in Nashville on the topic "Is the Bible True?" During debate on the anti-evolution bill, that lecture was distributed to members of the General Assembly and was credited with helping win its passage.

Shortly after the bill became law, in the New York office of the American Civil Liberties Union, a decision was made to test the validity of the law, and a news release was issued announcing the ACLU's interest in finding a Tennessee teacher willing to participate in the case. On May 4, The *Chattanooga Times* carried a story about the plan, a story read by George Rappleyea, a metallurgical engineer with the Dayton Coal and Iron Co. Mr. Rappleyea took the paper to Robinson's Drug Store where he asked the proprietor, F.E. Robinson, if he had seen the story. Mr. Robinson hadn't, but the two of them discussed the matter at length.

The next day, during a "chance" meeting at the drug store of Mr. Robinson, Mr. Rappleyea, Rhea County School Supt. Walter White, city officials, and lawyers, the decision was made to test the law. Rhea Central High School teacher John Thomas Scopes agreed to be the defendant and was promptly served with a warrant charging him with violating the statute.

Mr. Bryan, in part because of his influence in securing passage of the anti-evolution bill and in part because of his national stature, was invited to assist the prosecution. The day after Mr. Bryan's announcement that he would come to Dayton, Clarence Darrow, one of America's foremost defense attorneys, was urged by journalist H.L. Mencken to offer his services. By the end of that week, Mr. Darrow and New York divorce lawyer Dudley Field Malone volunteered to assist Dr. John R. Neal, an attorney from Spring City, Tenn., with the defense.

The confrontation between Bryan and Darrow was only one factor which caught the attention of the world in 1925; the modernist-fundamentalist religious controversy over the authority, even the relevance, of the Bible to "modern" life was another. This debate within the Protestant churches, particularly in the three years before the trial, had spilled over into the popular press and stayed there through the time of the Scopes Trial.

The religious aspect of the trial also raised the prospect in 1925 that a victory by the fundamentalists might coalesce into a political party and propel Mr. Bryan into a fourth run for the White House, a prospect frightening to his antagonists.

Of course, there was the scientific question: Did man evolve from a lower species or was he created by God? That question reflected 65 years of increasing conflict between the then-developing theory of evolution and the popularly held "young earth" view of creation by the non-academic element of the church.

Into this cauldron plunged John Scopes, William Jennings Bryan, Clarence Darrow, and the supporting cast on Friday, July 10, 1925, as Judge John T. Raulston gavelled his court to order.

Meet the Men behind the Characters

William Jennings Bryan - He had served as a U.S. representative from Nebraska from 1891-95; Democrat party candidate for president in 1896, 1900, and 1908; secretary of state for President Woodrow Wilson from 1912-1915; editor-in-chief of the *Omaha World-Herald*; founder and editor of *The Commoner*, a weekly paper for 23 years with a circulation of 140,000; and was a champion of the fundamentalist movement of his day.

Clarence Darrow - From Chicago, he was America's leading defense lawyer, although considered by some to be radical and sensational. In 1924, he had defended two college boys, Leopold and Loeb, accused of the brutal murder of a young man. He did not win an acquittal, but managed to avoid the death penalty for his clients by arguing that society, not the defendants, was responsible for the crime. He had supported Bryan during his first presidential campaign.

Thomas Stewart - He was district attorney general for the 18th Judicial Circuit, and regularly prosecuted cases before Judge Raulston. Gen. Stewart was elected to the United States Senate in 1942.

J. Gordon McKenzie - A Dayton attorney and former judge, he assisted in the prosecution. Mr. McKenzie was uncle of James McKenzie, Rhea County's Family Court judge, who holds court in the modern courthouse.

Ben McKenzie - He was a Dayton attorney, former district attorney general, father of J. Gordon, and grandfather of James McKenzie. He and Clarence Darrow became friends during the trial. Ben McKenzie was host when Darrow returned to Dayton in 1938, and he visited Darrow in Chicago.

Dudley Field Malone - A divorce lawyer with an international practice based in New

York, he participated in the trial on behalf of the American Civil Liberties Union. Malone had been Bryan's undersecretary of state. Following the trial, and following his own divorce and remarriage, he became a Hollywood actor for about 10 years.

Arthur Garfield Hays - He was partner with Dudley Field Malone in his international divorce practice and participated in the trial on behalf of the ACLU. He was of the Jewish faith, although an agnostic. He has been credited with masterminding much of the defense strategy.

Judge John Raulston - He was the presiding judge for the 18th Judicial Circuit, which included Rhea County. Judge Raulston lived in Winchester, Tenn., and was a devout Baptist. The trial took place a little more than a year before the 1926 election, in which Judge Raulston was a candidate to continue on the bench. He was not re-elected.

John T. Scopes - The defendant in the case, John Scopes had a very minor role in the proceedings. He had been hired the year before as a coach, mathematics, physics, chemistry, and general science teacher at Rhea Central High School. He substituted briefly for the regular biology teacher in the spring of 1925. When he returned to Dayton in 1960, he said he could not recall actually teaching the theory of evolution that year. He had been in the graduating class at Salem High School when William Jennings Bryan gave the commencement address, a fact which Mr. Bryan and Mr. Scopes discussed before the trial in Dayton.

The following is an excerpt from the trial transcript consisting of the complete examination of William Jennings Bryan by Clarence Darrow.

Darrow - You have given considerable study to the Bible, haven't you, Mr. Bryan?
Bryan - Yes, sir, I have tried to.
Q - Then you have made a general study of it?
A - Yes, I have; I have studied the Bible for about fifty years, or sometime more than that, but, of course, I have studied it more as I have become older than when I was but a boy.
Q - You claim that everything in the Bible should be literally interpreted?
A - I believe everything in the Bible should be accepted as it is given there: some of the Bible is given illustratively. For instance: "Ye are the salt of the earth." I would not insist that man was actually salt, or that he had flesh of salt, but it is used in the sense of salt as saving God's people.
Q - But when you read that Jonah swallowed the whale - or that the whale swallowed Jonah - excuse me please - how do you literally interpret that?
A - When I read that a big fish swallowed Jonah - it does not say whale.... That is my recollection of it. A big fish, and I believe it, and I believe in a God who can

make a whale and can make a man and make both what He pleases.

Q - Now, you say, the big fish swallowed Jonah, and he there remained how long - three days - and then he spewed him upon the land. You believe that the big fish was made to swallow Jonah?

A - I am not prepared to say that; the Bible merely says it was done.

Q - You don't know whether it was the ordinary run of fish, or made for that purpose?

A - You may guess; you evolutionists guess.....

Q - You are not prepared to say whether that fish was made especially to swallow a man or not?

A - The Bible doesn't say, so I am not prepared to say.

Q - But do you believe He made them - that He made such a fish and that it was big enough to swallow Jonah?

A - Yes, sir. Let me add: One miracle is just as easy to believe as another

Q - Just as hard?

A - It is hard to believe for you, but easy for me. A miracle is a thing performed beyond what man can perform. When you get within the realm of miracles; and it is just as easy to believe the miracle of Jonah as any other miracle in the Bible.

Q - Perfectly easy to believe that Jonah swallowed the whale?

A - If the Bible said so; the Bible doesn't make as extreme statements as evolutionists do....

Q - The Bible says Joshua commanded the sun to stand still for the purpose of lengthening the day, doesn't it, and you believe it?

A - I do.

Q - Do you believe at that time the entire sun went around the earth?

A - No, I believe that the earth goes around the sun.

Q - Do you believe that the men who wrote it thought that the day could be lengthened or that the sun could be stopped?

A - I don't know what they thought.

Q - You don't know?

A - I think they wrote the fact without expressing their own thoughts.

Q - Have you an opinion as to whether or not the men who wrote that thought

Stewart - I want to object, your honor; it has gone beyond the pale of any issue that could possibly be injected into this lawsuit, expect by imagination. I do not think the defendant has a right to conduct the examination any further and I ask your honor to exclude it.

Bryan - It seems to me it would be too exacting to confine the defense to the facts; if they are not allowed to get away from the facts, what have they to deal with?

The Court - Mr. Bryan is willing to be examined. Go ahead.

Darrow - I read that years ago. Can you answer my question directly? If the day was lengthened by stopping either the earth or the sun, it must have been the earth?

A - Well, I should say so.

Q - Now, Mr. Bryan, have you ever pondered what would have happened to the earth if it had stood still?

A - No.
Q - You have not?
A - No; the God I believe in could have taken care of that, Mr. Darrow.
Q - I see. Have you ever pondered what would naturally happen to the earth if it stood still suddenly?
A - No.
Q - Don't you know it would have been converted into molten mass of matter?
A - You testify to that when you get on the stand, I will give you a chance.
Q - Don't you believe it?
A - I would want to hear expert testimony on that.
Q - You have never investigated that subject?
A - I don't think I have ever had the question asked.
Q - Or ever thought of it?
A - I have been too busy on thinks that I thought were of more importance than that.
Q - You believe the story of the flood to be a literal interpretation?
A - Yes, sir.
Q - When was that Flood?
A - I would not attempt to fix the date. The date is fixed, as suggested this morning.
Q - About 4004 B.C.?
A - That has been the estimate of a man that is accepted today. I would not say it is accurate.
Q - That estimate is printed in the Bible?
A - Everybody knows, at least, I think most of the people know, that was the estimate given.
Q - But what do you think that the Bible, itself says? Don't you know how it was arrived at?
A - I never made a calculation.
Q - A calculation from what?
A - I could not say.
Q - From the generations of man?
A - I would not want to say that.
Q - What do you think?
A - I do not think about things I don't think about.
Q - Do you think about things you do think about?
A - Well, sometimes.
(Laughter in the courtyard.)
Policeman - Let us have order....
Stewart - Your honor, he is perfectly able to take care of this, but we are attaining no evidence. This is not competent evidence.
Bryan - These gentlemen have not had much chance - they did not come here to try this case. They came here to try revealed religion. I am here to defend it and they can ask me any question they please.
The Court - All right.

(Applause from the court yard.)
Darrow - Great applause from the bleachers.
Bryan - From those whom you call "Yokels."
Darrow - I have never called them yokels.
Bryan - That is the ignorance of Tennessee, the bigotry.
Darrow - You mean who are applauding you? *(Applause.)*
Bryan - Those are the people whom you insult.
Darrow - You insult every man of science and learning in the world because he does believe in your fool religion.
The Court - I will not stand for that.
Darrow - For what he is doing?
The Court - I am talking to both of you....
Darrow - Wait until you get to me. Do you know anything about how many people there were in Egypt 3,500 years ago, or how many people there were in China 5,000 years ago?
Bryan - No.
Q - Have you ever tried to find out?
A - No, sir. You are the first man I ever heard of who has been in interested in it. *(Laughter.)*
Q - Mr. Bryan, am I the first man you ever heard of who has been interested in the age of human societies and primitive man?
A - You are the first man I ever heard speak of the number of people at those different periods.
Q - Where have you lived all your life?
A - Not near you. *(Laughter and applause.)*
Q - Nor near anybody of learning?
A - Oh, don't assume you know it all.
Q - Do you know there are thousands of books in our libraries on all those subjects I have been asking you about?
A - I couldn't say, but I will take your word for it....
Q - Have you any idea how old the earth is?
A - No.
Q - The Book you have introduced in evidence tells you, doesn't it?
A - I don't think it does, Mr. Darrow.
Q - Let's see whether it does; is this the one?
A - That is the one, I think.
Q - It says B.C. 4004?
A - That is Bishop Usher's calculation.
Q - That is printed in the Bible you introduced?
A - Yes, sir....
Q - Would you say that the earth was only 4,000 years old?
A - Oh, no; I think it is much older than that.
Q - How much?

A - I couldn't say.
Q - Do you say whether the Bible itself says it is older than that?
A - I don't think it is older or not.
Q - Do you think the earth was made in six days?
A - Not six days of twenty-four hours.
Q - Doesn't it say so?
A - No, sir....
The Court - Are you about through, Mr. Darrow?
Darrow - I want to ask a few more questions about the creation.
The Court - I know. We are going to adjourn when Mr. Bryan comes off the stand for the day. Be very brief, Mr. Darrow. Of course, I believe I will make myself clearer. Of course, it is incompetent testimony before the jury. The only reason I am allowing this to go in at all is that they may have it in the appellate court as showing what the affidavit would be.
Bryan - The reason I am answering is not for the benefit of the superior court. It is to keep these gentlemen from saying I was afraid to meet them and let them question me, and I want the Christian world to know that any atheist, agnostic, unbeliever, can question me anytime as to my belief in God, and I will answer him.
Darrow - I want to take an exception to this conduct of this witness. He may be very popular down here in the hills....
Bryan - Your honor, they have not asked a question legally and the only reason they have asked any question is for the purpose, as the question about Jonah was asked, for a chance to give this agnostic an opportunity to criticize a believer in the world of God; and I answered the question in order to shut his mouth so that he cannot go out and tell his atheistic friends that I would not answer his questions. That is the only reason, no more reason in the world.
Malone - Your honor on this very subject, I would like to say that I would have asked Mr. Bryan - and I consider myself as good a Christian as he is - every question that Mr. Darrow has asked him for the purpose of bring out whether or not there is to be taken in this court a literal interpretation of the Bible, or whether, obviously, as these questions indicate, if a general and literal construction cannot be put upon the parts of the Bible which have been covered by Mr. Darrow's questions. I hope for the last time no further attempt will be made by counsel on the other side of the case, or Mr. Bryan, to say the defense is concerned at all with Mr. Darrow's particular religious views or lack of religious views. We are here as lawyers with the same right to our views. I have the same right to mine as a Christian as Mr. Bryan has to his, and we do not intend to have this case charged by Mr. Darrow's agnosticism or Mr. Bryan's brand of Christianity. *(A great applause.)*
Darrow - Mr. Bryan, do you believe that the first woman was Eve?
Bryan - Yes.
Q - Do you believe she was literally made out of Adams's rib?
A - I do.
Q - Did you ever discover where Cain got his wife?

A - No, sir; I leave the agnostics to hunt for her.
Q - You have never found out?
A - I have never tried to find
Q - You have never tried to find?
A - No.
Q - The Bible says he got one, doesn't it? Were there other people on the earth at that time?
A - I cannot say.
Q - You cannot say. Did that ever enter your consideration?
A - Never bothered me.
Q - There were no others recorded, but Cain got a wife.
A - That is what the Bible says.
Q - Where she came from you do not know. All right. Does the statement, "The morning and the evening were the first day," and "The morning and the evening were the second day," mean anything to you?
A - I do not think it necessarily means a twenty-four-hour day.
Q - You do not?
A - No.
Q - What do you consider it to be?
A - I have not attempted to explain it. If you will take the second chapter - let me have the book. *(Examining Bible.)* The fourth verse of the second chapter says: "These are the generations of the heavens and of the earth, when they were created in the day that the Lord God made the earth and the heavens," the word "day" there in the very next chapter is used to describe a period. I do not see that there is any necessity for construing the words, "the evening and the morning," as meaning necessarily a twenty-four-hour day, "in the day when the Lord made the heaven and the earth."
Q - Then, when the Bible said, for instance, "and God called the firmament heaven. And the evening and the morning were the second day," that does not necessarily mean twenty-four hours?
A - I do not think it necessarily does.
Q - Do you think it does or does not?
A - I know a great many think so.
Q - What do you think?
A - I do not think it does.
Q - You think those were not literal days?
A - I do not think they were twenty-four-hour days.
Q - What do you think about it?
A - That is my opinion - I do not know that my opinion is better on that subject than those who think it does.
Q - You do not think that ?
A - No. But I think it would be just as easy for the kind of God we believe in to make the earth in six days as in six years or in 6,000,000 years or in 600,000,000 years. I

do not think it important whether we believe one or the other.

Q - Do you think those were literal days?

A - My impression is they were periods, but I would not attempt to argue as against anybody who wanted to believe in literal days.

Q - I will read it to you from the Bible: "And the Lord God said unto the serpent, because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go and dust shalt thou eat all the days of thy life." Do you think that is why the serpent is compelled to crawl upon its belly?

A - I believe that.

Q - Have you any idea how the snake went before that time?

A - No, sir.

Q - Do you know whether he walked on his tail or not?

A - No, sir. I have no way to know. *(Laughter in audience.)*

Q - Now, you refer to the cloud that was put in heaven after the flood, the rainbow. Do you believe in that?

A - Read it.

Q - All right, Mr. Bryan, I will read it for you.

Bryan - Your Honor, I think I can shorten this testimony. The only purpose Mr. Darrow has is to slur at the Bible, but I will answer his question. I will answer it all at once, and I have no objection in the world, I want the world to know that this man, who does not believe in a God, is trying to use a court in Tennesseee -

Darrow - I object to that.

Bryan - *(Continuing)* to slur at it, and while it will require time, I am willing to take it.

Darrow - I object to your statement. I am exempting you on your fool ideas that no intelligent Christian on earth believes.

The Court - Court is adjourned until 9 o'clock tomorrow morning.

3. The Effects of the Scopes Trial on Secondary Biology Education

Joseph W. Francis

I. Introduction

In 1937, biologist George William Hunter, when questioned about his academic accomplishments, answered by claiming that his text "*A Civic Biology*, caused the Scopes Trial." John Scopes, the teacher indicted in the famous trial, reportedly used the Hunter text to teach evolution in the public school classroom prior to his arrest in Dayton, Tennessee for violation of the Butler Act.

Since biology texts following the trial pay meager attention to evolution, multiple historians believe that the Scopes Trial somehow caused a curtailing of the subject of evolution in the biology texts and classrooms for decades after the trial. This has generated a cultural myth that the anti-evolutionary (and anti-intellectual) crusade of fundamentalists in the 1920s curbed the advance of education in the United States.

II. Hunter's *A Civic Biology*

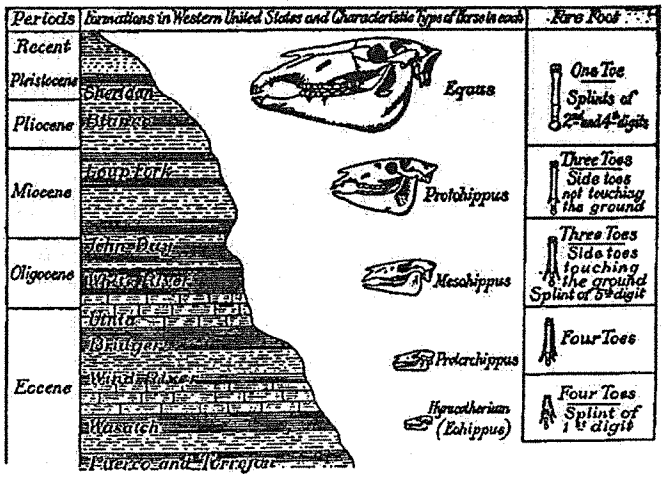
A Civic Biology was one of the most popular texts and perhaps the best selling high school biology text in the 1920s. Hunter taught at both the high school and college level and wrote textbooks throughout his career. Hunter was a prolific author, writing 17 texts, published from 1907 to 1949, although the 1949 text was published posthumously. Most of Hunter's secondary school biology texts were very popular, with sales reaching the millions in the 1930s. He was one of a small group of authors whose texts dominated the market in the 1920s and 1930s.

A. Hunter's Basic Biology and Evolution

The basic descriptions and diagrams of organisms and discussion of their lifecycles in Hunter's text are very typical for textbooks of that time period. In addition to this descriptive biology, the practical benefits of organisms to the environment, society, or man's well-being is a general theme found throughout the text. Eugenics, the advancement of man through racial improvement, and euthenics, the improvement of man through environmental enhancements, were mentioned in various places in these later chapters. Hunter had many opportunities to insert evolutionary

theory into his text, but he limited it to several pages in one chapter. Macroevolutionary relationships, natural selection, and the life of Charles Darwin were all included, but the topic of evolution was not portrayed as a unifying biological concept.

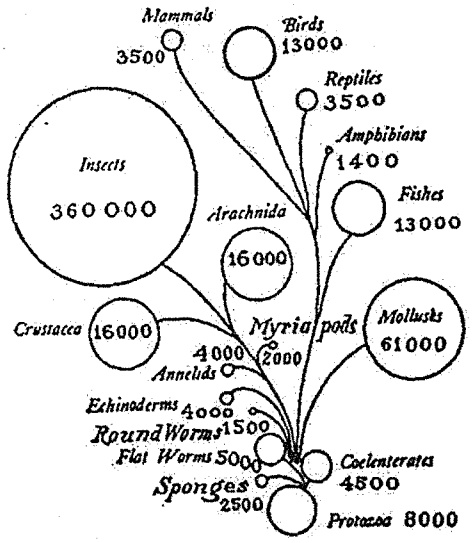
Increasing Complexity of Structure and of Habits in Plants and Animals. — In our study of biology so far we have attempted to get some notion of the various factors which act upon living things. We have seen how plants and animals interact upon each other. We have learned something about the various physiological processes of plants and animals, and have found them to be in many respects identical. We have found grades of complexity in plants from the one-celled plant, bacterium or pleurococcus, to the complicated flowering plants of considerable size and with many



The geological history of the horse. (After Mathews, in the American Museum of Natural History.) Ask your teacher to explain this diagram.

organs. So in animal life, from the Protozoa upward, there is constant change, and the change is toward greater complexity of structure and functions. An insect is a higher type of life than a protozoan, because its structure is more complex and it can perform its work with more ease and accuracy. A fish is a higher type of animal than the insect for these same reasons, and also for another. The fish has an internal skeleton which forms a pointed column of bones on the *dorsal* side (the back) of the animal. It is a vertebrate animal.

The Doctrine of Evolution. — We have now learned that animal forms may be arranged so as to begin with very simple one-celled forms and culminate with a group which contains man himself This arrangement is called the *evolutionary series*. Evolution means change, and these groups are believed by scientists to represent stages in complexity of development of life on the earth. Geology teaches that millions of years ago, life upon the earth was very simple, and that gradually more and more complex forms of life appeared, as the rocks formed latest in time show the most highly developed forms of animal life. The great English scientist, Charles Darwin, from this and other evidence, explained the theory of evolution. This is the belief that simple forms of life on the earth slowly and gradually gave rise to those more complex and that thus ultimately the most complex forms came into existence.



The evolutionary tree. Modified from Galloway. Copy this diagram in your notebook. Explain it as well as you can.

The Number of Animal Species. — Over 500,000 species of animals are known to exist to-day, as the following table shows.

Protozoa	8,000	Arachnids	16,000
Sponges	2,500	Crustaceans	16,000
Cœlenterates	4,500	Mollusks	61,000
Echinoderms	4,000	Fishes	13,000
Flatworms	5,000	Amphibians	1,400
Roundworms	1,500	Reptiles	3,500
Annelids	4,000	Birds	13,000
Insects	360,000	Mammals	3,500
Myriapods	2,000	Total	518,900

Man's Place in Nature. — Although we know that man is separated mentally by a wide gap from all other animals, in our study of physiology we must ask where we are to place man. If we attempt to classify man, we see at once he must be placed with the vertebrate animals because of his possession of a vertebral column. Evidently, too, he is a mammal, because the young are nourished by milk secreted by the mother and because his body has at least a partial covering of hair. Anatomically we find that we must place man with the apelike mammals, because of these numerous points of structural likeness. The group of mammals which includes the monkeys, apes, and man we call the *primates*.

Although anatomically there is a greater difference between the lowest type of monkey and the highest type of ape than there is between the highest type of ape and the lowest savage, yet there is an immense mental gap between monkey and man.

Instincts. — Mammals are considered the highest of vertebrate animals, not only because of their complicated structure, but because their instincts are so well developed. Monkeys certainly seem to have many of the mental attributes of man.

Professor Thorndike of Columbia University sums up their habits of learning as follows: —

"In their method of learning, although monkeys do not reach the human stage of a rich life of ideas, yet they carry the animal method of learning, by the selection of impulses and association of them with different sense-impressions, to a point beyond that reached by any other of the lower animals. In this, too, they resemble man; for he differs from the lower animals not only in the possession of a new sort of intelligence, but also in the tremendous extension of that sort which he has in common with them. A fish learns slowly a few simple habits. Man learns quickly an infinitude of habits that may be highly complex. Dogs and cats learn more than the fish, while monkeys learn more than they. In the number of things he learns, the complex habits he can form, the variety of lines along which he can learn them, and in their permanence when once formed, the monkey justifies his inclusion with man in a separate mental genus."

Evolution of Man. — Undoubtedly there once lived upon the earth races of men who were much lower in their mental organization than the present inhabitants. If we follow the early history

of man upon the earth, we find that at first he must have been little better than one of the lower animals. He was a nomad, wandering from place to place, feeding upon whatever living things he could kill with his hands. Gradually he must have learned to use weapons, and thus kill his prey, first using rough stone implements for this purpose. As man became more civilized, implements of bronze and of iron were used. About this time the subjugation and domestication of animals began to take place. Man then began to cultivate the fields, and to have a fixed place of abode other than a cave. The beginnings of civilization were long ago, but even to-day the earth is not entirely civilized.

The Races of Man. — At the present time there exist upon the earth five races or varieties of man, each very different from the other in instincts, social customs, and, to an extent, in structure. These are the Ethiopian or negro type, originating in Africa; the Malay or brown race, from the islands of the Pacific; the American Indian; the Mongolian or yellow race, including the natives of China, Japan, and the Eskimos; and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America.

Reference Books

Elementary

Hunter, *Laboratory Problems in Civic Biology*, American Book Company.
Bulletin of U.S. Department of Agriculture, *Division of Biological Survey*, Nos. 1, 6, 13, 17.
Davison, *Practical Zoölogy*. American Book Company.
Ditmars, *The Reptiles of New York*. Guide Leaflet 20. Amer. Mus. of Nat. History.
Sharpe, *A Laboratory Manual in Biology*, pp. 140–150. American Book Company.
Walker, *Our Birds and Their Nestlings*. American Book Company.
Walter, H. E. and H. A., *Wild Birds in City Parks*. Published by authors.

Advanced

Apgar, *Birds of the United States*. American Book Company.
Beebe, *The Bird*. Henry Holt and Company.
Ditmars, *The Reptile Book*. Doubleday, Page and Company.
Hegner, *Zoölogy*. The Macmillan Company.
Horneday, *American Natural History*.
Jordan and Evermann, *Food and Game Fishes*. Doubleday, Page and Company.
Parker and Haswell, *Textbook of Zoölogy*. The Macmillan Company.
Riverside Natural History. Houghton, Mifflin and Company.
Weed and Dearborn, *Relation of Birds to Man*. Lippincott.

B. Hunter's Progressive, "Hygienic" Biology

Although Hunter concentrated the topic of evolution into one area in his text, he does refer to Darwinian selection in various places throughout the text when discussing the social condition of man and his potential for "improvement" through control of human reproduction. The connection between evolution and eugenics is logical because the concept of natural selection involves the perpetuation of the strong and the "best fit." In fact, Hunter turned these ideas into a justification for racism and eugenics, the improvement of human society via the perpetuation and dominion of the strong and elimination of the weak. One conclusion which can be drawn from this is that Hunter's interest in evolution may have been more as a support for eugenics rather than as a foundational principle for general biology. In a small section on page 261 subtitled "Improvement of Man," Hunter suggested that three factors contribute to the successful future of mankind, "These are personal hygiene, selection of healthy mates [eugenics] and the betterment of the environment [euthenics]."

Hunter's proposal of "selection of healthy mates" may not sound like radical eugenic ideology but his advocacy of white supremacy and racism is unmistakably evident in several places in the text. For instance, in a section of chapter 14 subtitled "The Races of Man," Hunter described several major human races and concluded, "finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America." In another chapter, as Hunter described the problem of hookworm in the southern United States, he included a quote from an article from the *Atlantic Constitution* that claimed that hookworm is "a more costly, threatening, and tangible problem than the negro problem" (p. 230). In the chapter on heredity and variation, Hunter again displayed his pro-eugenic views as he describes criminal and "feebleminded" individuals and families as "parasites." He wrote, "They are true parasites... If such people were lower animals, we would probably kill them off to prevent them from spreading" (p. 263).

III. Evolution in Secondary School Biology Texts

Studies which focus on the content of evolution in high school biology textbooks from the late nineteenth century to the mid twentieth century show that evolution was not included or when it was included was covered as a minor topic. Overall, an increase in the content of evolution in textbooks did occur, but at a snail's pace throughout this time period.

There is probably no simple answer to the question of why the evolution content of the texts was so low during this time period, but there are several trends in the disciplines of biology and biology education during this time period which together may have contributed to this phenomenon. These trends are 1) a shift in the teaching of biology from advanced courses to general biology classes, 2) domination of the textbook market by a few textbooks, 3) a focus on practical biology and human welfare supported by the state syllabi and national education associations, 4) avoidance of controversial topics in the secondary schools, and 5) disagreement among biologists as to the relevance of natural selection as the mechanism of evolution.

A. Shift to General Biology

In the nineteenth century, biology was traditionally taught in advanced courses such as zoology and botany. In the early decades of the twentieth century, the general biology course was developed and taught as an introductory first year course in high school, and many schools had adopted this course format by the 1920s. As a result of this shift, curriculum content changed dramatically in several ways. Many advanced topics were eliminated, and the inclusion of abstract or theoretical topics was minimized. Hunter stated in *Essentials of Biology*, "abstractions are not a part of the thought of a first year pupil."

The idea that evolution is a difficult subject for school children would be repeated often in many studies analyzing biology education during this time period, with the earliest reference in the 1909 text *The Teaching of Biology in the Secondary School*, by Lloyd and Bigelow. They quoted no less a scholar than T.H. Huxley, "It is not that I think the evidence of that doctrine [evolution] insufficient, but that I doubt whether it is the business of a teacher to plunge the young mind into difficult problems concerning the origin of the existing condition of things."

B. Domination by a Few Authors

The textbooks of Hunter and other New York authors dominated the textbook market across the nation during the early part of the twentieth century. New York led the nation in educational reform, the development of centralized school districts, and curriculum. Many New York educators took advantage of the major textbook publishers located in the city. Hunter and his colleagues Linville and Gruenberg are credited with designing and implementing the general biology course. Consequently the New York authors and their texts would be the primary influence on topics included in the science classroom curriculum in the early 1900s. Not only

did texts with minimal evolution content dominate the market, but Giorno showed that school districts and teachers tended to stick with a textbook for 12-38 years. She concluded that there was no place in the curriculum for new developments in science partly because teachers are inclined to teach what they were taught and to adhere closely to their favorite textbook. Thus, it is easy to see how evolution would have been under-represented in many schools across the country because of the delay involved in updating of texts and because the dominant textbooks contained little evolution content.

C. Practical Biology and Human Welfare

Many of the national associations of this time period recommended that biology education should be of a practical nature, a biology of "human welfare," and theoretical concepts like evolution were either not mentioned or not emphasized. The National Education Association (NEA) published a report in 1918, the Cardinal Principles of Secondary Education, which stated, "the curriculum of secondary schools should be determined by the needs of the society to be served, the character of the individuals to be educated, and the knowledge of educational theory and practice available." The NEA omitted evolution from a list of recommended topics for biology secondary education in its 1920 report "Reorganization of Science in Secondary Schools."

D. Controversial Subjects Avoided

One of the outcomes of the Progressive era, especially in the post-bellum southern United States, was the idea that social problems could be solved by education with the goal of uniting of people with different views or backgrounds. This was a difficult job since many factions, races and creeds existed in the U.S. The idea that the biology classroom was a place for cooperation and unity was also recognized in the NEA's 1918 report. They pointed out that the U.S. was "diversified" racially and that the "school is one agency that may be controlled definitely for the purpose of unifying the people." Skoog noted that evolution could be viewed as a principle which unified biological ideas but in a social context it was divisive. In addition, Pauly noted that the influential New York textbook authors believed that evolution "disturbed" the classroom and it had the ability to "antagonize potentially vocal elements of the public."

E. Controversy among Biologists

Not only were educators aware of the divisive nature of evolutionary

biology within the public square, but many were aware of and most likely influenced by the intense disagreements about the mechanism of evolution within academia itself. Much of the disagreement centered around the role of natural selection in the evolution process. In 1920s some scholars declared selection as a dead and "condemned" theory. Several leading evolutionary thinkers of the time period also severely criticized selection theory as a mechanism because it failed to explain common phenomena in the fields of psychology and animal behavior. Since even scientists themselves could not agree on how evolution occurred, it should come as no surprise that the biology textbook authors of the first half of the twentieth century were reluctant to include in-depth coverage of evolution in their secondary school biology texts.

IV. The Scopes Trial and Biology Education

Many historians and analysts have blamed the Scopes Trial and Christian fundamentalists in particular for causing a dramatic decrease in the content of evolution in the textbooks after the trial. For example, Moore claimed that the "amount of evolution taught decreased dramatically" and "all publishers removed Darwin's ideas as a unifying theme of life from their high school biology books." Moore suggests that the trial had an effect on biology curriculum and teaching for 35 years.

Undoubtedly, the fundamentalists did influence the textbook authors and publishers, but in general the evolution-based content in the texts did not decrease dramatically after the trial. Although Hunter did modify his text, the changes were minimal and the word count regarding topics related to evolution remained fairly constant for all of Hunter's texts published in the 1910s-1930s. Despite the alterations that were made, the total evolution content of textbooks did not significantly change. In fact, analysis of the texts from the first six decades of the twentieth century shows that evolution content in the texts, instead of decreasing, slowly increased from the 1900s to the 1960s.

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4. Socioeconomic Factors Leading to the Scopes Trial

William L. Ketchersid and Ralph T. Green

I. Dayton

The tiny community located in what is now South Dayton was originally named Smith's Crossroads in honor of an early settler. In the 1870s, while constructing a railroad connecting New Orleans and Cincinnati (and Dayton, Ohio beyond), the Queen and Crescent planned to run the rails through Smith's Crossroads and not the Rhea County seat and larger community of Washington, nine miles to the northwest. In anticipation of the economic prosperity allowed by faster transportation, merchants in Washington migrated to Smith's Crossroads and in 1877 proposed Dayton as a new name (one story because a merchant who often purchased in Dayton, OH liked the name). When the railroad was completed in 1880, the new depot was labeled "Dayton" even though the name was not voted on until 1885, on the eve of a population explosion.

II. Economy

Throughout most of its early history, Smith's Crossroads, then Dayton, was an agricultural community. In the early 1870s financial speculators in Great Britain sought to mine the coal and iron resources reported in rocks near Smith's Crossroads. Delayed by the panic of 1873, the newly incorporated Dayton Coal and Iron Company began building two iron smelters in Dayton in 1884 and was in full production of coal and pig iron in 1886. The company remained solvent through the panic of 1893 and mine explosions in 1895 and 1901 that killed 29 and 21 miners respectively. Aside from the depression years of 1892-1897, the DC&I Co. enjoyed profits until 1910. Dropping pig iron prices in the decade before World War I and a steep rise in the cost of iron ore when a lease with Roane Iron Co. expired in 1912, combined with financial difficulties of the foreign owners, led to a company bankruptcy in 1914. Eventually, investors in Pennsylvania procured the old DC&I Co. holdings and in 1922 incorporated as the Cumberland Coal and Iron Company, with George Rappleyea as company manager. Attempts to restart the smelting process failed, and the mines closed for the last time in 1927.

III. The Trial Comes to Dayton

After the Tennessee legislature passed the Butler Act, the ACLU advertised for a

teacher who would be willing to help them challenge the law. The news excited Rappleyea, who had moved to Dayton from New York and married into a Dayton family. Rappleyea sensed an opportunity to attract publicity to Dayton, which might bring with it new, much needed industry including financiers for his Cumberland Coal and Iron Company. On May 5, 1925, Rappleyea met with F.E. Robinson, School Superintendent White, and attorney Wallace Haggard and urged them to find a teacher to respond to challenge the evolution law. Robinson and White thought a Dayton challenge to the evolution law might be a great idea.

During the trial, F.E. Robinson and business associate W.E. Morgan produced a booklet entitled "Why Dayton of All Places?" The pamphlet contained articles that extolled the virtues of Dayton; it even included some photographs of the town's main streets and industries, as well as a chronology of the "Red Letter Days Leading Up To The Evolution Trial, in 1925."

Those who planned the trial were disappointed, since Dayton did not become immediately prosperous. A tangible and lasting contribution of the trial for Dayton was the challenge from real estate developer G.F. Washburn to offer $10,000 for the founding of a memorial college named for William Jennings Bryan. While in Dayton, Bryan had expressed the desire for a private Christian school to be built on one of the beautiful hills in the town. The idea caught on and a William Jennings Bryan Memorial Association came into existence with F.E. Robinson serving as its first president. Despite the lack of money that many supporters expected to come from the Bryan estate, the association opened William Jennings Bryan University in 1930 as a non-denominational Christian liberal arts college. The first classes met in the high school building where John Scopes had taught five years before. As the college has grown to more than 500 students with a faculty and staff close to 125, the college has had an enormous educational and economic impact on the city of Dayton.

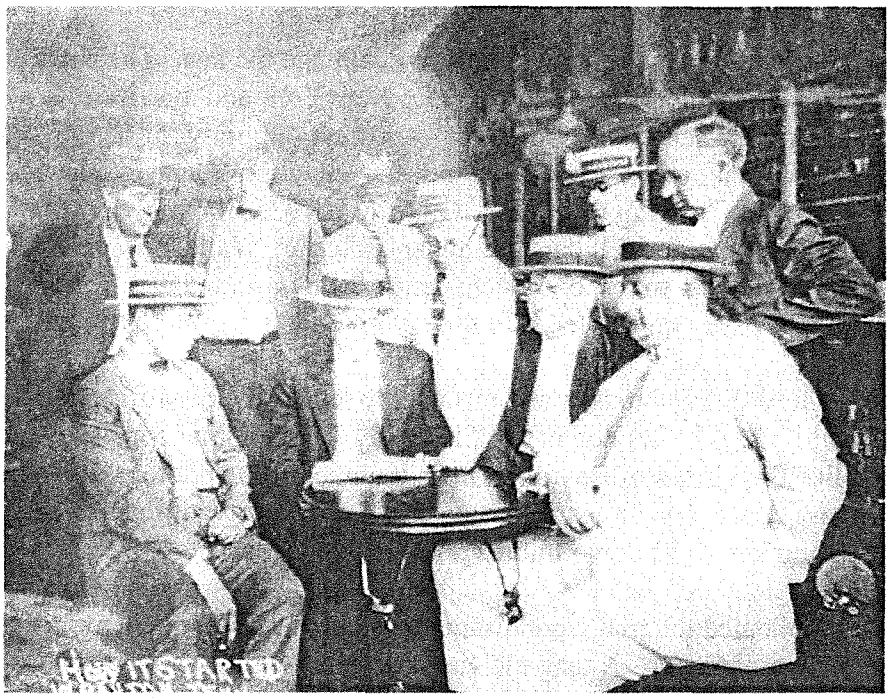

Figure 1. A re-enactment of the beginning of the Scopes trial. Seated, left to right: H. Hicks, J. Scopes, W. White, G. McKenzie. Standing, left to right: B. Wilbur, W. Haggard, W.E. Morgan, G. Rappleyea, S. Hicks, F.E. Robinson.

Figure 2. Scopes accompanied to the trial by defense attorney John Neal and instigator George Rappleyea (left to right).

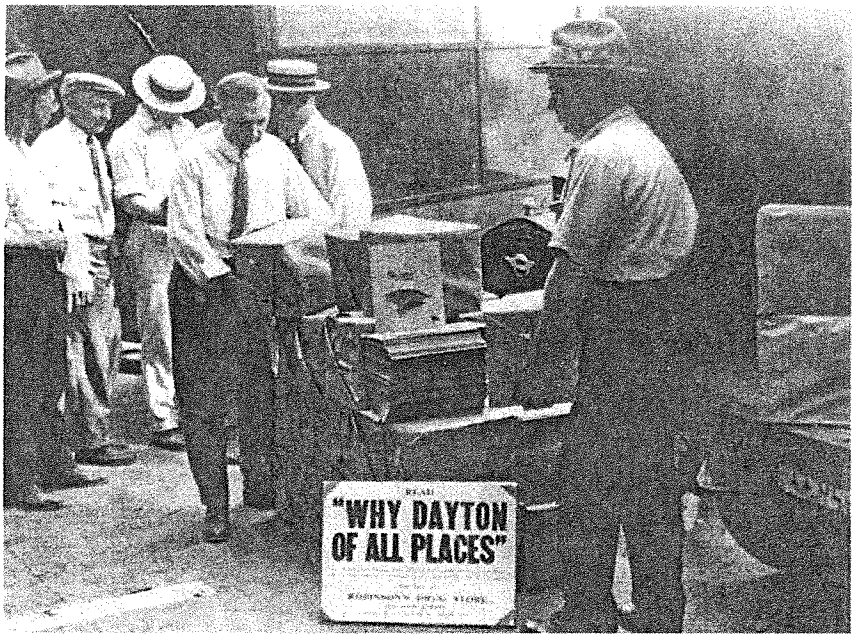

Figure 3. Robinson and Morgan's pamphlets on sale during the trial.

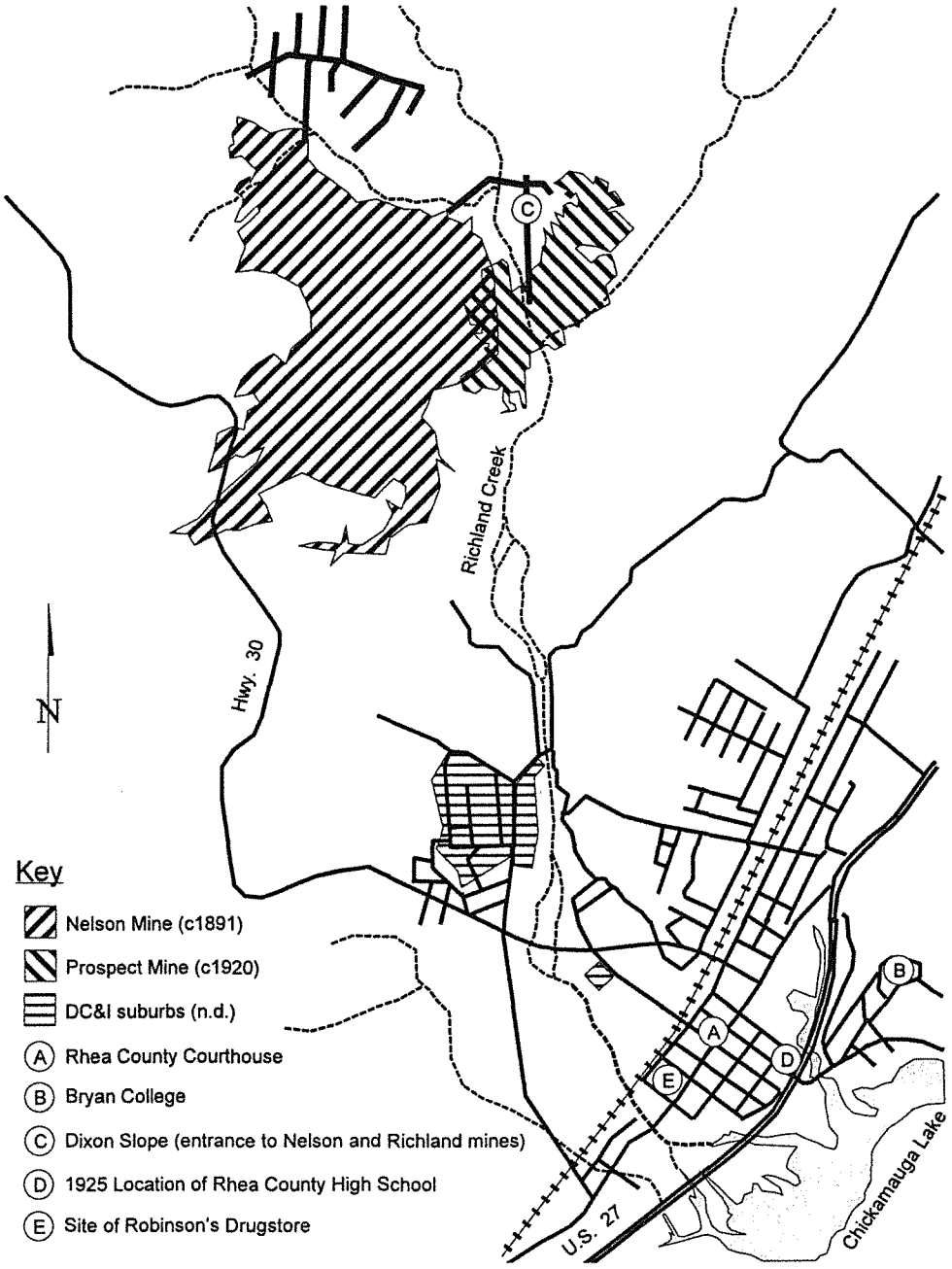

Figure 4. Map of coal mines and company suburbs superimposed on a street map of modern Dayton.

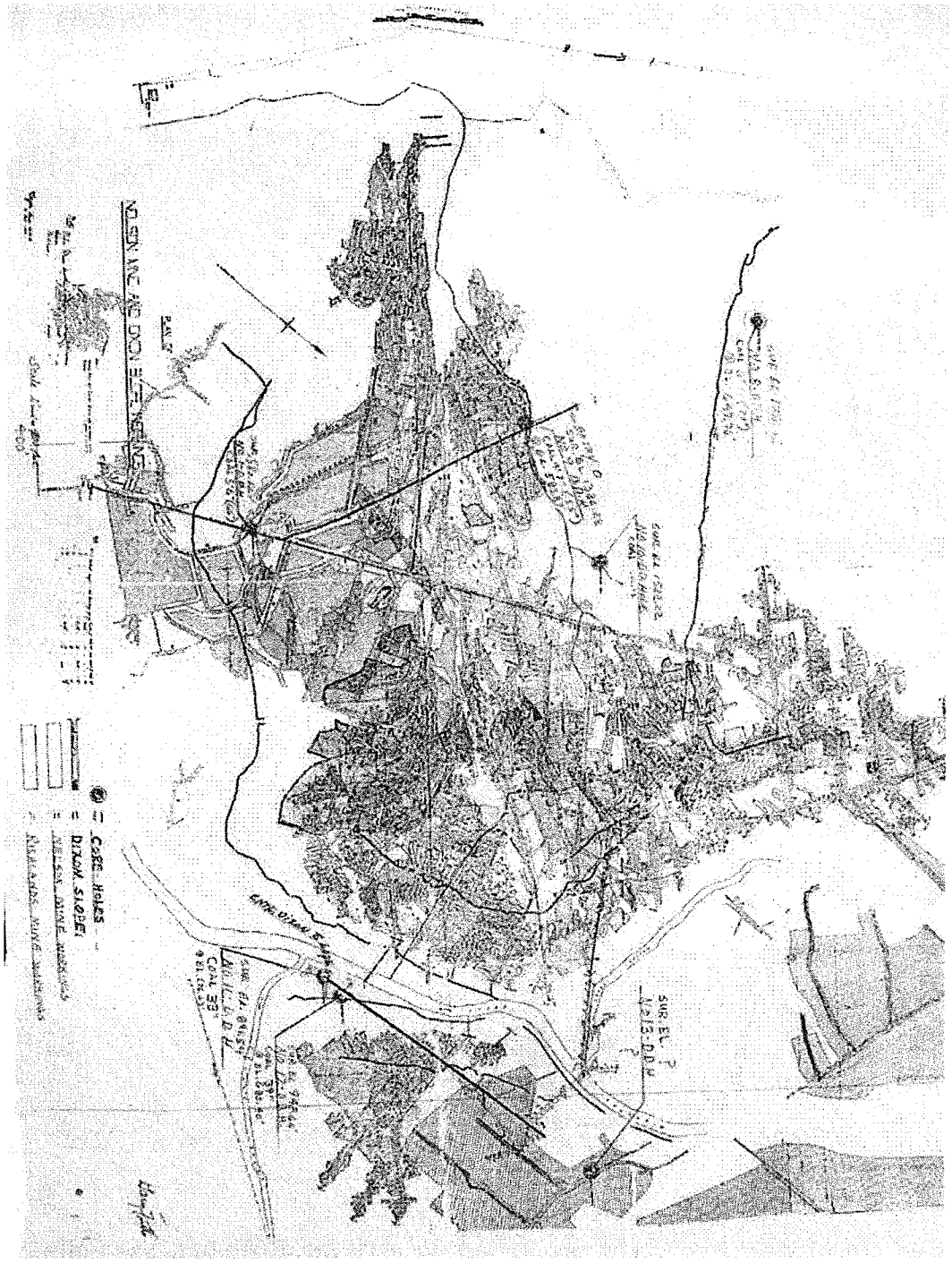

Figure 5. The Nelson mine operated by the Dayton Coal & Iron Company, c1901.

Figure 6. A map of the Prospect Mine operated by the Dayton Coal, Iron, and Railway Company, c.1920.

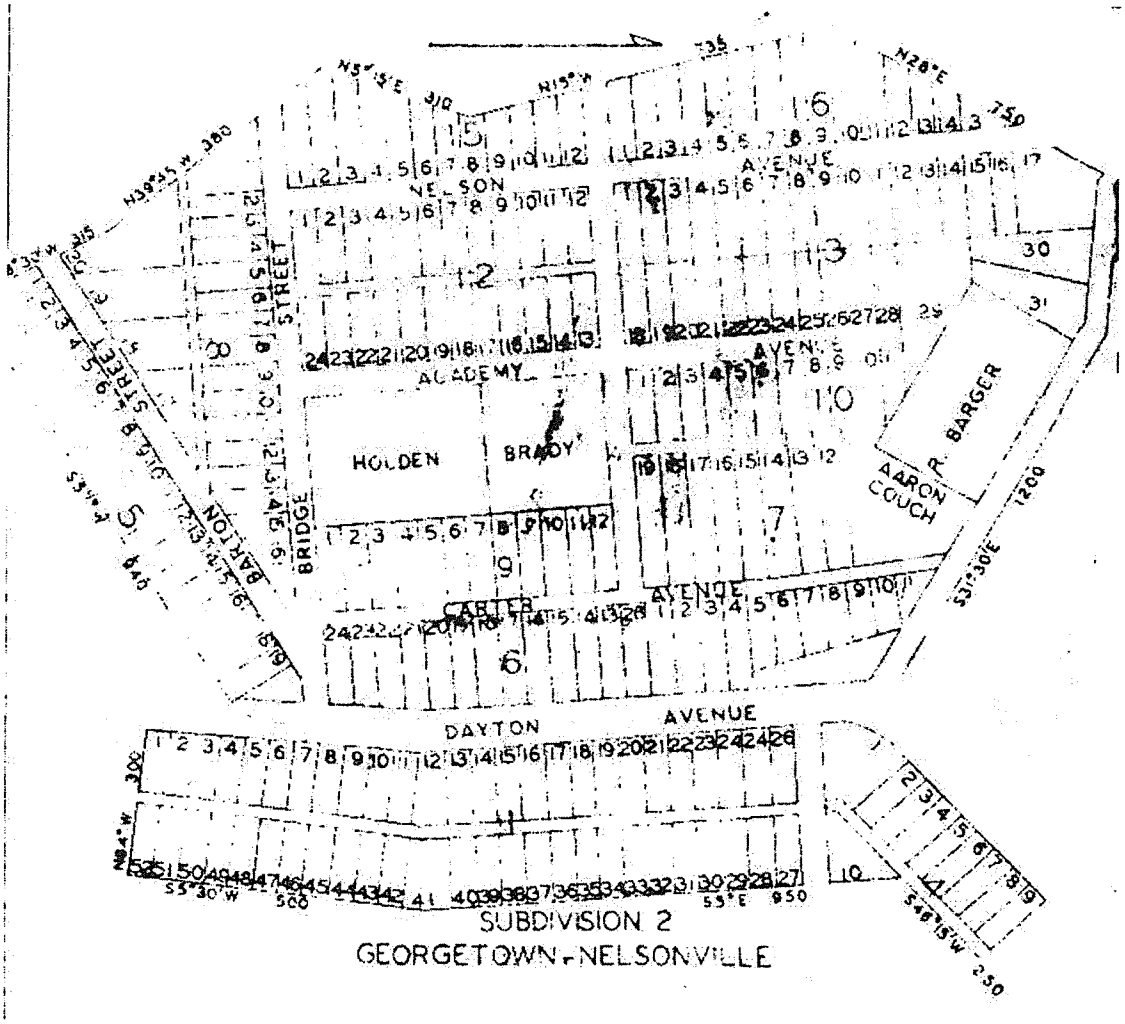

Figure 7. Subdivision "Georgetown-Nelsonville" was actually Morgantown, just down Richland Creek from the Dixon Slope opening to the Nelson and Prospect Mines. Nelson, Academy, and Carter Avenues still exist.

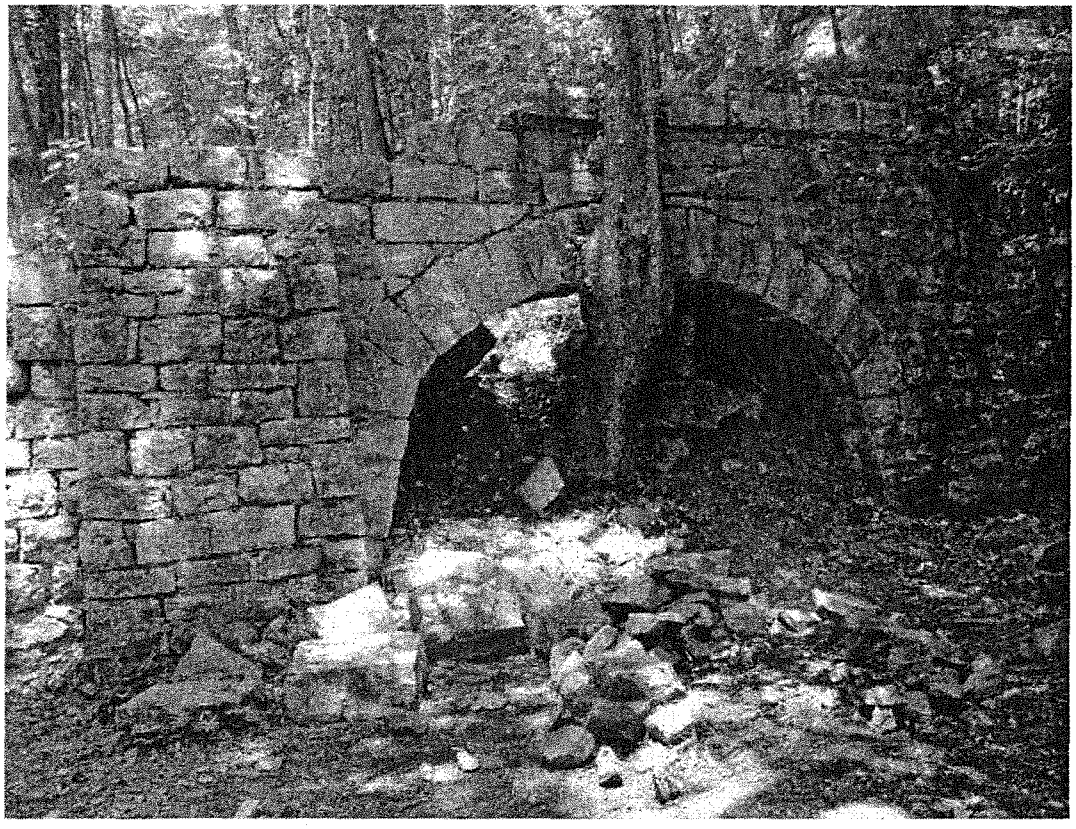

Figure 8. The entrance to the Dixon Slope as it appears today.

5. Defense Strategies in the Scopes Trial

Glenn M. Sanford and Kenneth E. Hendrickson III

I. The Plan

The Scopes defense team came to Dayton, not just to go through the motions of a publicity stunt, but to open broad social and legal questions that would allow them to move the case into the federal courts - all the while, assaulting the perceived evils of fundamentalism. Though the ACLU team fully expected to lose in Dayton, they came to Tennessee determined ultimately to win. In order for the defense to win, it was essential that they receive a ruling stating that the Butler Act was unconstitutional, for there were no plans to contest the fact that Scopes had taught evolution. In fact, if Scopes were to be found "not guilty," the defense would lose their opportunity to challenge what they saw as a rising tide of anti-intellectual fundamentalist constraints on the free exchange of ideas. Defense counsel planned to so strategize the trial that they could look forward to sufficient publicity to capture the attention of the American people to sustain their momentum as they pressed into the appellate process. For the defense, a U.S. Supreme Court ruling against the constitutionality of the ant-evolution statute was the holy grail of this campaign.

II. Constitutional Challenge

In the lead up to the start of the Dayton trial, the defense filed a petition asking the federal courts to issue an injunction against enforcement of the Bulter Act. Judge John J. Gore denied the defense's petition for a federal injunction. Judge Gore cited the fact that Scopes was indicted in the Rhea County Circuit Court for violating a state statute in that county and the case was still pending. He failed to find any extraordinary circumstances that would warrant a federal intrusion into what was essentially a state matter. Further, Judge Gore cited Sections 265 and 266 of the federal judicial code as prohibiting a federal judge from granting such an injunction, unless the petition was heard by a panel of thee judges.

At the trial, defense hoped to get Judge John T. Raulston to agree that the Butler Act was a *de facto* violation of the Tennessee Constitution guarantee of religious freedom by imposing an unspecified Biblical creation narrative with state sanction and protection. In offering the motion for Raulston so to rule, the defense also asked to enter all its evidence prior to the ruling. Although there was little chance of success in this move, it was both a clever and a necessary preliminary step for the defense to make. First, the move to quash on grounds of unconstitutionality

forced open the debate about "science v. religion." Recall that the defense arrived to win a sweeping constitutional victory against religious fundamentalism - this would require a debate over the appropriate role of religion in society and the accompanying establishment issues. They hoped to achieve this by plunging the trial into an open debate concerning the epistemological authority of science as compared to various religions and they knew that if Judge Raulston ruled against them before the evidence was in they would lose their best shot at the debate they needed.

Moreover, beyond the immediacy of the Scopes case, Stewart understood that the ACLU, in pursuing a test case, was eager to strike a blow for a reformation of public education. ACLU annual reports for the first years of the 1920s (during the organization's infancy) discussed the goal of promoting a "new social order" which included securing a legally protected, professional and expert educational establishment that could deliver approved information to the public without fear of serious popular resistance. ACLU objectives were wholly in line with the development of political Progressivism as that movement existed in early twentieth century America. Contemporary law recognized the right of the legislature, with its ties to changing popular will, to control the content of public education.

Day Two of the trial focused on arguments relating to the constitutionality of Butler. Defense counsel Malone and Hays argued that Butler violated Article I, Section 3 of the Tennessee state constitution guaranteeing religious freedom by imposing the Christian creation narrative. Why privilege just one religious viewpoint? What of the Qu'ran or some other religious text or perspective? The prosecution, particularly Stewart, simply rebutted that Butler did not affect liberty of worship and that a teacher in the public schools could attend (or not) any religious group he might choose. Moreover, to invalidate Butler would be to invalidate the right of the legislature to oversee education as a state function. The last word on the argument was left to Darrow, who did not speak until later in the day. Darrow contended that the guarantees of religious freedom in Section 3 protected teachers even, as historian J. P. Moran has pointed out, against the will of the majority acting through the legislature. Given the state of case law at the time, Darrow had little hope of carrying this point. In the event, Raulston ruled with the prosecution that Butler was an unexceptional exercise of the normal police powers of the Tennessee state legislature.

III. Denying the Biblical Narrative

After local defense attorney John Randolph Neal entered a plea of "Not Guilty" and Judge Raulston overruled a perfunctory motion to dismiss the case, ACLU

Counsel Dudley Field Malone argued that to convict Scopes, the state would have to show that Scopes taught evolution while at the same time denying the Biblical narrative. This was a particularly crucial stratagem because of the potential to force the trial back toward a review of the reasonableness of Butler against a background of religious and scientific uncertainty. Advancing the strategies set out in the original motion, Malone promised to offer "credible testimony" showing that there are conflicting accounts of creation within the Bible. Malone then tried to introduce Bryan into their discussion of the modernist-fundamentalist tension. Finally, Malone attempted to read into the record an account of evolution as a means of introducing the defense plan to show that evolution does not conflict with Christianity.

With the strategy in place, the jury was sworn in and the first witness, Walter White, was called to the stand. In the course of his testimony, the prosecution attempted to enter the King James Bible as an exhibit. This resulted in an objection from defense attorney Hays. After pointing out that Catholics accept the Douay Bible and Protestants the King James Bible, he raised the issue of translation from the original Hebrew, Aramaic, and Greek texts before questioning whether the legislature intended to "distinguish between the various religious sects in passing this law?" Hays contended that the statute does not stipulate a specific version of the Bible, and as such, he asked the court to require "the prosecution to prove what the Bible is before they put it into evidence." Judge Raulston overruled the objection.

IV. Expert Witnesses

The jury was excluded from the courtroom to allow for scientific testimony in advance of the judge ruling on its admissibility. As Darrow began to question his first witness, Dr. Maynard M. Metcalf, a zoologist, prosecutor Stewart pointed out that Tennessee Law required that a defendant must be the first defense witness or he could not take the stand at all. Judge Raulston offered the defense an opportunity to withdraw Dr. Metcalf and call Scopes to the stand. Darrow's response, "Your honor, every single word that was said against this defendant, everything was true" should remove any doubt that the defense was not in Dayton to argue the facts of the case, but rather arrived with only the intention of challenging the legitimacy of the Butler Act. Prosecution attorneys went on to argue that the law and the Bible were transparent and self-interpreting on their face and needed no other authority to deliver their meaning. Judge Raulston asked, "Is this your position, that the story of the divine creation is so clearly set forth in the Bible, in Genesis, that no reasonable minds could differ as to the method of creation, that is, that man was created by God?" Stewart replied succinctly, "Yes."

The opening of the Sixth Day was dominated by Judge Raulston's ruling denying expert testimony and Darrow's unbridled sarcasm in responding to the ruling. Regardless of what one thinks of his legal reasoning, Raulston had handed the defense the grounds for an appeal - a challenge to this statutory construction. This is not to say that he had erred. In fact, the Supreme Court of Tennessee would later uphold Judge Raulston's interpretation on this matter. With this ruling, he had undercut the central tenets of the defense case and practically ensured a conviction.

V. Butler Act Too Vague

Unable to present the core of their defense to the jury, the defense turned their attention to their only remaining theme - the statute was too vague to allow for reasonable enforcement. Hays, admitting that it did not bear on the issue set down by the court, asked to have it noted that Scopes was under contract to teach biology in a public school "and that under the law he was obliged to teach from the book provided by the public schools." Had the defense been able to present the case that Scopes was placed in an untenable situation by conflicting actions of the state - outlawing the teaching of evolution and providing Scopes with a textbook that teaches evolution, the prosecution could, (and certainly would) have raised the simple response, that Scopes was not on trial for using the textbook, but rather for his decision to teach evolution. Nonetheless, this would have provided the defense with another chance to question the nature of evolution and attempt to draw the prosecution into a debate concerning the vagueness of the statute; namely, how does one determine which sections of a state-approved textbook can and which cannot be taught?

VI. Other Contemporary Rulings

In the eighty years since the Scopes trial, it has been regularly portrayed as the genesis of the legal battles surrounding biblical literalism, but a review of contemporaneous court rulings shows this not to be true. In *Freeman v. Scheve*, the Supreme Court of Nebraska heard a case resulting from a mandamus suit asking that a school board to stop Bible readings and the singing of religious songs. The Supreme Courts of Wisconsin and Michigan faced similar questions in *Weiss v. District Board* and *Pfeiffer v. Board of Education*, respectively. Despite the fact that the Supreme Court of Tennessee passed over these issues during its ruling on the Scopes case, these and numerous other state court cases demonstrate that the question of what, if any, place the Bible should hold in relation to public school curricula was an open and hotly contested issue. Intersecting with these rulings, in the years, and even weeks, immediately

preceding the Scopes trial, the U.S. Supreme Court had delivered decisions regarding the extent to which state legislatures could regulate the curricula of their states' schools.

In 1899, the Tennessee Supreme Court had upheld expansive powers of the legislature to control public education in *Leeper v. State* - a power that would be upheld in subsequent U.S. Supreme Court decisions. The Tennessee Court advanced several reasons for this decision. For the purposes of the Scopes prosecution team, the most important are: 1) the education of future leaders of the Commonwealth is a state concern; 2) "the establishment and control of public schools is a function of the General Assembly;" 3) the legislature "has the power to prescribe the course of study as well as the books to be used;" 4) the legislature's "discretion as to methods cannot be controlled by the courts unless some scheme is devised which is contrary to the other provisions of the Constitution." Beyond these, the court made a distinction between the state regulating textbook sales within its property, the public schools, and the state attempting to regulate general property rights within the general community. It also drew attention to the fact that the state did not require all of its citizens to purchase the books; rather only those who chose to receive "the benefits of the public schools." Taken as a whole, the reasoning in the *Leeper* decision provides a reasonable guide to the legal context of the Scopes trial within the state of Tennessee.

As we have seen, the defense pursued the "sectarian strategy" in several gambits. During the trial, the defense objected to the introduction of the King James Bible as "the Bible" contending that to adopt this version as the Bible elevated the "Protestant Bible" above the "Catholic Bible" and the "Hebrew Bible." There was nothing new (or guaranteed) in this strategy. For example, in *Weiss v. District Board*, the Supreme Court of Wisconsin had addressed this same issue thirty-five years before Scopes came to trial finding unanimously that reading passages from the Bible without comment in Wisconsin public schools was unconstitutional. Eight years later, in *Pfeiffer v. Board of Education*, the Supreme Court of Michigan, in a 4-1 decision, held that this same practice was acceptable. Supreme Court of Nebraska, in 1902, disposed of the *Freeman v. Scheve* case by ruling that the practice was unconstitutional. Two striking commonalities emerge from these cases: 1) rulings against including the Bible dedicated considerable effort to discussions addressing the establishment issue of adopting a particular Bible, generally the King James version, for the readings; 2) opinions accepting the Bible stressed the role and value of religion for enhancing the character of citizens, thereby promoting the public good.

An instructive decision on matters of legislative intent at the time leading up to

the Scopes trial was the case of *Hennington v. Georgia*. Hennington had been charged with the crime of running a freight train on the Sabbath day in Georgia. Much like Scopes, Hennington admitted his action, but contested the constitutionality of the statute. In this case, Hennington contended that the Georgia law was an unlawful restriction of interstate trade due to its effect on the multi-state rail line. The U.S. Supreme Court affirmed the Georgia Court's decision that the law was a reasonable exercise of state police power to promote the public welfare. The majority held that while "inspection, quarantine, and health laws" might all have the effect of disrupting interstate commerce, the laws must be considered valid unless congressional legislation to the contrary exists. In such cases, the local laws "to the extent of the conflict, must give way." In rendering the decision, the Court continually returned to the power of the state to enact laws to promote the public good and the limits of the courts to get involved in such matters.

Taken as a whole, the judicial context of the Scopes trial shows that questions regarding the limits of states' powers to control curricula and the appropriate place, if any, of the Bible within those curricula were under active consideration in the courts. For the Scopes defense, a victory would require stringing together a few successful state supreme court challenges to teaching or reading the Bible in public schools with extrapolations from *Meyer* and *Pierce*. When these arguments were tested in the Supreme Court of Tennessee they were flatly rejected. Decisions by other states' courts were not at all binding within Tennessee or at the U.S. Supreme Court. Because of the way *Scopes* actually ended there is no way of knowing for certain how the U.S. Supreme Court would have ruled. It is a relatively safe bet that the prosecution would have had an easier time making its case to the Court - we can only speculate and continue to debate whether or not the defense would have been up to the challenge of demonstrating that the statute was impermissibly vague.

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6. Courtroom Interaction of Bryan, Darrow, and Malone

Richard M. Cornelius

The State of Tennessee vs. John Thomas Scopes was one of the most heavily covered trials in its day with some 200 journalists, 65 telegraph operators, photographers, wire services crews, newsreel cameramen, and Chicago radio station WGN reporting it as the first live national broadcast of an American trial. An airstrip was built on the edge of Dayton so that written dispatches and newsreel film could be flown out to inform the world. Watson Davis, who was present and representing Science Service, said, "The largest array of telegraph press facilities used up to that time was established in Dayton." Twenty papers in China bought the rights to publish the daily stenographic report. And in the eighty years since the trial, it has continued to be the subject of news stories, feature accounts, radio interviews, TV documentaries, elementary and high school National History Day projects, college term papers, master's theses, doctoral dissertations, novels, plays, poems, over fifteen songs, museum exhibits, Hollywood feature films, and a summer festival at the Scopes Trial courthouse.

In spite of all the quantity of verbiage, however, the quality of veracity is seriously lacking. The major hindrance to an accurate understanding of The State of Tennessee vs. John Thomas Scopes is the need to separate the chaff of histrionic fiction and misinterpretation from the wheat of historical fact and accurate evaluation. This problem of obtaining a true account of the Dayton trial began with its faulty media stories of 1925. Journalists came with predispositions for "unofficially acting in behalf of the defense" (to quote Bryan's definitive biographer) and with predetermined orders on how and what to report. Unfortunately the problem has been exacerbated over the past eighty years by the overwhelming majority of the journalists, critics, biographers, historians, and dramatic script writers who fabricated their accounts of the trial by looking through their own tinted worldview glasses at the colored misrepresentations by the Jazz Age media of the Roaring Twenties and the McCarthyism Age protest play of the Frantic Fifties - *Inherit the Wind.*

Since the Scopes Trial occurred in fairly recent history, it offered historians and critics the apparent advantage of interviewing many of its participants and first-hand observers though few availed themselves of the opportunity. Some of these first-hand accounts, however, because recorded years later have proven to be untrustworthy:

- Clarence Darrow in his autobiography published seven years after the Scopes Trial does not even quote correctly his own remarks as recorded in the trial transcript about the "Read Your Bible" sign and where it was.

- Harry Shelton, one of the two schoolboy witnesses against Scopes, said that he could not distinguish between what he did or said and what some article or book said he did.

- Dr. Kirtley F. Mather, one of the scientific witnesses for the defense, recording his Scopes experience years later is in error about which month the trial planners met, how many weeks Scopes taught biology, and how Bryan became a part of the trial.

- Roger N. Baldwin, 1925 ACLU Director and author of the longest encyclopedia account of the trial, is in error about what subjects Scopes taught, when the ACLU initiated the case, how Bryan became a part of the trial, and how long the trial lasted.

Added to the above problems is the pitfall of evaluating the 1925 scene from the enlightened perspective of our current day and consequently not making charitable allowance for the following facts:

- The scientists who wrote up their testimony for the trial record were 1925 scientists and should not be severely censored when they accept with some caution such fossil evidence as the Piltdown Man (now known to be a hoax).

- Dr. George William Hunter's A Civic Biology, the high school textbook used at Scopes' school and the most widely used book of its kind throughout the United States, was a racist book (as were many textbooks in that era). The chapter on evolution closes with a list of the five races of man and concludes with the words "and finally, the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America."

- The judge, 6 defense lawyers, 8 prosecution lawyers, and the 200 reporters were not scientists or theologians.

- The term "Fundamentalist" originated in 1920 and came from the publication of twelve scholarly volumes in 1910-15 entitled *The Fundamentals* and written by American and British scholars. Bryan was not officially a Fundamentalist although he often was invited to speak for the movement, and he believed in its essential doctrines: (1) The Deity of

> Christ, (2) His Virgin Birth, (3) His substitutionary death on the cross for the sins of mankind, (4) His miracles, the greatest of which was His resurrection, and - most important in the Scopes Trial - (5) The Divine inspiration and authority of the Judeo-Christian Scriptures. Bryan held to the historic, orthodox Christian position that accepted the literal, verbal, plenary, inerrant inspiration of the Bible, which, as he explained when put on the stand by the defense, is not to be confused with the literal interpretation of all passages in the Bible. Since the Scopes Trial era the term "Fundamentalist" has developed in a variety of diverse definitions, directions, and distinct movements. For the past several years, the strangest and most illegitimate usage of the term has been by the media, which ironically has used this strongly Biblically Christian term to designate a sector of fervently loyal Islamic believers.

The Dishonorable Mention List of erroneous views concerning the Scopes Trial propagated by the various groups of creative/critical writers listed above is a lengthy one which includes but is not limited to the following:

- That John T. Scopes taught evolution.
- That the Dayton citizens who initiated the trial were anti-evolution, Bible thumping, balmy-brained, benighted, backwoods, Fundamentalist boobs, or to quote H. L. Mencken, they were "gaping primates," and " a forlorn mob of imbeciles."
- That Bryan was against the teaching of evolution in any and all respects and was for the teaching of the Bible in the public schools,
- That Dudley Field Malone's major speech by its content and delivery outshone and dethroned Bryan as a great orator,
- And that Arthur Garfield Hays's strategy and Clarence Darrow's application of it in his interrogation of Bryan destroyed him as worthy thinker.

To some extent, this paper will address all of these misconceptions but especially focus on the last three, which involves the performance of Bryan, Darrow, and Malone. There is almost universal agreement among Scopes Trial reporters and, consequently, trial historians, commentators, and biographers of Scopes Trial lawyers that Malone and Darrow succeeded admirably, and Bryan failed miserably, especially when on the witness stand being interrogated by Darrow with Hays and Malone providing behind-the-scenes support.

I. Background basics
   A. The extensive press & historical coverage of the trial in 1925 and afterward
   B. The inaccurate and unfairly biased media, historical, and literary coverage-especially *Inherit the Wind*
   C. Problems of untrustworthy testimonies of trial participants and observers
      1. Clarence Darrow - defense lawyer
      2. Harry (Bud) Shelton - schoolboy witness
      3. Dr. Kirtley Mather - scientific witness from Harvard University
      4. Roger Baldwin - ACLU Director
   D. Summary of significant 1925 problems in evaluating the trial
      1. The errors of scientific witnesses concerning such fossil evidence as the Piltdown Man
      2. The racism of Hunter's *Civic Biology* textbook
      3. The fact that none of the trial legal or media personnel were scientists or theologians
      4. The variety of diverse definitions, directions, and distinct movements developing from the original term "Fundamentalist"
   E. Summary of the erroneous views which this paper examines
      1. That John T. Scopes taught evolution
      2. That the Dayton citizens who initiated the trial were an anti-evolution, Bible-thumping, Fundamentalist "forlorn mob of imbeciles"
      3. That Dudley Field Malone's major speech by its content and delivery outshone and dethroned Bryan as a great orator
      4. That Arthur Garfield Hays's strategy and Clarence Darrow's application of it in his trial remarks and especially in his interrogation of Bryan destroyed him as a worthy thinker
      5. That Bryan was against the teaching of evolution in any and all respects and was for the teaching of the Bible in the public schools

II. False views of focal figures and ideas of the Scopes Trial
   A. John Thomas Scopes as a teacher of evolution and a crusader for academic freedom
   B. The citizens of Dayton as fanatic, anti-intellectual, anti-science Fundamentalists

III. Analysis of the major speech of Dudley Field Malone on trial day five
   A. Its positive reception
   B. Its strengths
   C. Its weaknesses
   D. Similarities to and differences from the ideas of William Jennings Bryan
   E. Qualities of a great speech

IV. Analysis of Clarence Seward Darrow's major speeches in the Scopes Trial
   A. Strengths
   B. Weaknesses
   C. Similarities to and differences from the ideas of William Jennings Bryan

V. Analysis of Darrow's interrogation of Bryan on trial day seven
   A. Media and spectators' response in 1925
   B. Response by subsequent media commentators, historians, critics, and literary writers
   C. Critique of the questions and answers of Darrow and Bryan

VI. Analysis of "The Last Message" of William Jennings Bryan
   A. Weaknesses
   B. Strengths

VII. Conclusion

What follows is a transcript of Malone's speech from day five of the trial.

Dudley Field Malone - If the court please, it does seem to me that we have gone far afield in this discussion. However, probably this is the time to discuss everything that bears on the issues that have been raised in this case, because after all, whether Mr. Bryan knows it or not, he is a mammal, he is an animal and he is a man. But, Your Honor, I would like to advert to the law, and to remind the court that the heart of the matter is the question of whether there is liability under this law.

I have been puzzled and interested at one and the same time at the psychology of the prosecution and I find it difficult to distinguish between Mr. Bryan, the lawyer in this case; Mr. Bryan, the propagandist outside of this case, and the Mr. Bryan who made a speech against science and for religion just now - Mr. Bryan my old chief and friend. I know Mr. Bryan. I don't know Mr. Bryan as well as Mr. Bryan knows Mr. Bryan, but I know this, that he does believe - and Mr. Bryan, Your Honor, is not the only one who believes in the Bible. As a matter of fact there has been much criticism, by indirection and implication, of this text, or synopsis, if you please, that does not agree with their ideas. If we depended on the agreement of theologians, we would all be infidels. I think it is in poor taste for the leader of the prosecution to cast reflection or aspersions upon the men and women of the teaching profession in this country. God knows, the poorest paid profession in America is the teaching profession, who devote themselves to science, forego the gifts of God, consecrate their brains to study, and eke out their lives as pioneers in the fields of duty, finally hoping that mankind will profit by his efforts, and to

open the doors of truth.

Mr. Bryan quoted Mr. Darwin. That theory was evolved and explained by Mr. Darwin seventy-five years ago. Have we learned nothing in seventy-five years? Here we have learned the truth of biology, we have learned the truth of anthropology, and we have learned more of archeology? Not very long since the archeological museum in London established that a city existed, showing a high degree of civilization in Egypt 14,000 years old, showing that on the banks of the Nile River there was a civilization much older than ours. Are we to hold mankind to a literal understanding of the claim that the world is 6,000 years old, because of the limited vision of men who believed the world was flat, and that the earth was the center of the universe, and that man is the center of the earth. It is a dignified position for man to be the center of the universe, that the earth is the center of the universe, and that the heavens revolve about us. And the theory of ignorance and superstitution for which they stood are identical, a psychology and ignorance which made it possible for theologians to take old and learned Galileo, who proposed to prove the theory of Copernicus, that the earth was round and did not stand still, and to bring old Galileo to trial-for what purpose? For the purpose of proving a literal construction of the Bible against truth, which is revealed. Haven't we learned anything in seventy-five years? Are we to have our children know nothing about science except what the church says they shall know? I have never seen harm in learning and understanding, in humility and open-mindedness, and I have never seen clearer the need of that learning than when I see the attitude of the prosecution, who attack and refuse to accept the information and intelligence, which expert witnesses will give them. Mr. Bryan may be satisfactory to thousands of people. It is in so many ways that he is satisfactory to me; his enthusiasm, his vigor, his courage, his fighting ability these long years for the things he thought were right. And many a time I have fought with him, and for him; and when I did not think he was right, I fought just as hard against him. This is not a conflict of personages; it is a conflict of ideas, and I think this case has been developed by men of two frames or mind. Your Honor, there is a difference between theological and scientific men. Theology deals with something that is established and revealed; it seeks to gather material, which they claim should not be changed. It is the Word of God, and that cannot be changed; it is literal, it is not to be interpreted. That is the theological mind. It deals with theology. The scientific is a modern thing, Your Honor. I am not sure that Galileo was the one who brought relief to the scientific mind; because, theretofore, Aristotle and Plato had reached their conclusions and processes, by metaphysical reasoning, because they had no telescope and no microscope. These were things that were invented by Galileo. The difference between the theological mind and the scientific mind is that the theological mind is closed, because that is what is revealed and is settled. But the scientist says no, the Bible is the book of revealed religion, with rules of conduct, and with aspirations-that is the Bible.

The scientist says, take the Bible as guide, as an inspiration, as a set of philosophies and preachments in the world of theology.

And what does this law do? We have been told here that this was not a religious question. I defy anybody, after Mr. Bryan's speech, to believe that this was not a religious question. Mr. Bryan brought all of the foreigners into this case. Mr. Bryan had offered his services from Miami, Fla.; he does not belong in Tennessee. If it be wrong for American citizens from other parts of this country to come to Tennessee to discuss issues which we believe, then Mr. Bryan has no right here, either. But it was only when Mr. Darrow and I had heard that Mr. Bryan had offered his name and his reputation to the prosecution of this young teacher, that we said, Well, we will offer our services to the defense. And, as I said in the beginning, we feel at home in Tennessee; we have been received with hospitality, personally. Our ideas have not taken effect yet; we have corrupted no morals so far as I know, and I would like to ask the court if there was any evidence in the witnesses produced by the prosecution, of moral deterioration due to the course of biology which Prof. Scopes taught these children - the little boy who said he had not been hurt by it, and who slipped out of the chair possibly and went to the swimming pool; and the other who said that the theory he was taught had not taken him out of the church. This theory of evolution, in one form or another, has been up in Tennessee since 1832, and I think it is incumbent on the prosecution to introduce at least one person in the state of Tennessee whose morals have been affected by the teaching of this theory.

After all, we of the defense contend, and it has been my experience, Your Honor, in my twenty years, as Mr. Bryan said, as a criminal lawyer, that the prosecution had to prove its case; that the defense did not have to prove it for them. We have a defendant here charged with a crime. The prosecution is trying to get Your Honor to take the theory of the prosecution as the theory of our defense. We maintain our right to present our own defense, and present our own theory of our defense, and to present our own theory of this law, because we maintain, Your Honor, that if everything that the state has said in its testimony be true - and we admit it is true - that under this law the defendant Scopes has not violated that statute. Haven't we the right to prove it by our witnesses if that is our theory, if that is so. Moreover, let us take the law - Be it enacted by the state of Tennessee that it shall be unlawful for any teacher in any universities, normals or any other schools in the state which are supported in whole or in part by public funds of the state, to teach any theory that denies the story of divine creation of man as taught in the Bible, and to teach him that man is descended from a lower order of animals. If that word had been "or" instead of "and," then the prosecution would only have to prove half of its case. But it must prove, according to our contention, that Scopes not only taught a theory that man had descended from a lower order of animal life, but at the same time, instead of that theory, he must teach the theory

which denies the story of divine creation set forth in the Bible. And we maintain that we have a right to introduce evidence by these witnesses that the theory of the defendant is not in conflict with the theory of creation in the Bible. And, moreover, Your Honor, we maintain we have the right to call witnesses to show that there is more than one theory of the creation in the Bible. Mr. Bryan is not the only one who has spoken for the Bible; Judge McKenzie is not the only defender of the word of God. There are other people in this country who have given their whole lives to God. Mr. Bryan, to my knowledge, with a very passionate spirit and enthusiasm, has given most of his life to politics. We believe - (*Applause.*)

Mr. Malone - I would like to say Your Honor, as personal information, that probably no man in the United States has done more to establish certain standards of conduct in the mechanics and world of politic than Mr. Bryan. But is that any reason that I should fall down when Bryan speaks of theology? Is he the last word on the subject of theology?

Well do I remember in my history the story of the burning of the great library at Alexandria, and just before it was burned to the ground that the heathen, the Mohamedians and the Egyptians, went to the hostile general and said, "Your Honor, do not destroy this great library, because it contains all the truth that has been gathered," and the Mohamedian general said, but the Koran contains all the truth. If the library contains the truth that the Koran contains we do not need the library and if the library does not contain the truth that the Koran contains then we must destroy the library anyway."

But these gentlemen say the Bible contains the truth - if the world of science can produce any truth or facts not in the Bible as we understand it, then destroy science, but keep our Bible." And we say "keep your Bible." Keep it as your consolation, keep it as your guide, but keep it where it belongs, in the world of your own conscience, in the world of your individual judgment, in the world of the Protestant conscience that I heard so much about when I was a boy, keep your Bible in the world of theology where it belongs and do not try to tell an intelligent world and the intelligence of this country that these books written by men who knew none of the accepted fundamental facts of science can be put into a course of science, because what are they doing here? This law says what? It says that no theory of creation can be taught in a course of science, except one which conforms with the theory of divine creation as set forth in the Bible. In other words, it says that only the Bible shall be taken as an authority on the subject of evolution in a course on biology.

The Court - Let me ask you a question, Colonel? It is not within the province of this court to determine which is true is it?

Mr. Malone - No, but it is within the province of the court to listen to the evidence we wish to submit to make up its own mind, because here is the issue -

The Court - I was going to follow that with another question. Is it your theory - is it your opinion that the theory of evolution is reconcilable with the story of the divine creation as taught in the Bible?

Mr. Malone - Yes.

The Court - In other words, you believe - when it says - when the Bible says that God created man, you believe that God created the life cells and that then out of that one single life cell the God created man by a process of growth or development - is that your theory?

Mr. Malone - Yes.

The Court - And in that you think that it doesn't mean that he just completed him, complete all at once?

Mr. Malone - Yes, I might think that and I might think he created him serially - I might think he created him anyway. Our opinion is this - we have the right, it seems to us, to submit evidence to the court of men without question who are God-fearing and believe in the Bible and who are students of the Bible and authorities on the Bible and authorities on the scientific world - they have a right to be allowed to testify in support of our view that the Bible is not to be taken literally as an authority in a court of science.

The Court - That is what I was trying to get, your position on. Here was my idea. I wanted to get your theory as to whether you thought it was in the province of the court to determine which was true, or whether it was your theory that there was no conflict and that you had a right to introduce proof to show what the Bible - what the true construction or interpretation of the Bible story was.

Mr. Malone - Yes.

The Court - That is your opinion.

Mr. Malone - Yes. And also from scientists who believe in the Bible and belong to churches and who are God-fearing men - what they think about this subject, of the reconcilement of science and religion - of all science and the Bible -Your Honor, because yesterday I made a remark, Your Honor, which might have been interpreted as personal to Mr. Bryan. I said that the defense believed we must keep a clear distinction between the Bible, the church, religion and Mr. Bryan. Mr.

Bryan, like all of us, is just an individual, but like himself he is a great leader. The danger from the viewpoint of the defense is this, that when any great leader goes out of his field and speaks as an authority on other subjects his doctrines are quite likely to be far more dangerous than the doctrines of experts in their field who are ready and willing to follow, but what I don't understand is this, Your Honor, the prosecution inside and outside of the court has been ready to try the case and this is the case. What is the issue that has gained the attention not only of the American people, but people everywhere? Is it a mere technical question as to whether the defendant Scopes taught the paragraph in the book of science? You think, Your Honor, that the News Association in London, which sent you that very complimentary telegram you were good enough to show me in this case, because the issue is whether John Scopes taught a couple of paragraphs out of his book? Oh, no, the issue is as broad as Mr. Bryan himself has made it. The issue is as broad as Mr. Bryan has published it and why the fear? If the issue is as broad as they make it why the fear of meeting the issue? Why, where issues are drawn by evidence, where the truth and nothing but the truth are scrutinized and where statements can be answered by expert witnesses on the other side - what is this psychology of fear? I don't understand it. My old chief - I never saw him back away from a great issue before. I feel that the prosecution here is filled with a needless fear. I believe that if they withdraw their objection and hear the evidence of our experts their minds would not only be improved but their souls would be purified. I believe and we believe that men who are God-fearing, who are giving their lives to study and observation, to the teaching of the young - are the teachers and scientists of this country in a combination to destroy the morals of the children to whom they have dedicated their lives? Are preachers the only ones in America who care about our youth? Is the church the only source of morality in this country? And I would like to say something for the children of the country. We have no fears about the young people of America. They are a pretty smart generation. Any teacher who teaches the boys or the girls today, an incredible theory - we need not worry about those children of this generation paying much attention to it. The children of this generation are pretty wise. People, as a matter of fact I feel that the children of this generation are probably much wiser than many of their elders. The least that this generation can do, Your Honor, is to give the next generation all the facts, all the available data, all the theories, all the information that learning, that study, that observation has produced - give it to the children in the hope of heaven that they will make a better world of this than we have been able to make it. We have just had a war with twenty-million dead. Civilization is not so proud of the work of the adults. Civilization need not be so proud of what the grown ups have done. For God's sake let the children have their minds kept open - close no doors to their knowledge; shut no door from them. Make the distinction between theology and science. Let them have both. Let them both be taught. Let them both live. Let them be reverent, but we come here to say that the defendant is not guilty of violating this law. We have a

defendant whom we contend could not violate this law. We have a defendant whom we can prove by witnesses whom we have brought here and are proud to have brought here, to prove, we say, that there is no conflict between the Bible and whatever he taught. Your Honor, in a criminal case we think the defendant has a right to put in his own case, on his own theory, in his on way. Why! because Your Honor, after you hear the evidence, if it is inadmissible if it is not informing to the court and informing to the jury, what can you do? You can exclude it - you can strike it out. What is the jury system that Mr. Bryan talked so correctly about just about a week ago, when he spoke of this jury system, when he said it was a seal of freedom for free men, in a free state? Who has been excluding the jury for fear it would learn something? Have we? Who has been making the motions to take the jury out of the courtroom? Have we? We want everything we have to say on religion and on science told and we are ready to submit our theories to the direct and cross-examination of the prosecution. We have come in here ready for a battle. We have come in here for this duel. I don't know anything about dueling, Your Honor. It is against the law of God. It is against the church. It is against the law of Tennessee, but does the opposition mean by duel that our defendant shall be strapped to a board and that they alone shall carry the sword, is our only weapon the witnesses who shall testify to the accuracy of our theory - is our weapon to be taken from us, so that the duel will be entirely one-sided? That isn't my idea of a duel. Moreover it isn't going to be a duel.

There is never a duel with the truth. The truth always wins and we are not afraid of it. The truth is no coward. The truth does not need the law. The truth does not need the forces of government. The truth does not need Mr. Bryan. The truth is imperishable, eternal and immortal and needs no human agency to support it. We are ready to tell the truth as we understand it and we do not fear all the truth that they can present as facts. We are ready. We are ready. We feel we stand with progress. We feel we stand with science. We feel we stand with intelligence. We feel we stand with fundamental freedom in America. We are not afraid. Where is the fear? We meet it, where is the fear? We defy it, we ask Your Honor to admit the evidence as a matter of correct law, as a matter of sound procedure and as a matter of justice to the defense in this case. (*Profound and continued applause.*)

7. Judge Raulston's Agenda and Its Impact on the Scopes Trial

The Hon. Lawrence Puckett

The excerpt is not included in this publication as it has been for the other symposium presentations.

Instead the complete paper appears after page 120, which was the last page in the original publication.

8. Social Darwinism as a Cause of the Scopes Trial

Edward J. Larson

I. Social Darwinism

Valuing competition fit the spirit of nineteenth century Britain and had roots extending long before the publication of Darwin's great book, *Origin of Species*. To use familiar British examples, during the late 1700s, Adam Smith argued that economic progress depended on individual competition. Thomas Malthus soon observed that, due to natural limits in resources, some individuals would gain and some would lose in any social competition. Referring to the process as a "struggle for existence" (at least in the context of primitive human societies), Malthus wrote of the "goad of necessity" bringing out the best in people. As early as 1851, Herbert Spencer began sketching out his concept that a form of natural selection, which he termed "survival of the fittest," worked hand-in-hand with social or cultural evolution to generate human progress over time.

With his 1859 *Origin of Species*, Darwin pushed this line of reasoning a critical step further by presenting competition as producing fitter varieties, races, and ultimately species by continually selecting the fittest individuals to reproduce their kind. Spencer and many other Victorian social scientists quickly accepted the key Darwinian insight: regardless of the source of variations, all aspects of human nature and behavior originate and evolve through the natural, artificial, or sexual selection of individuals that display particular traits. In its broadest sense, this was Social Darwinism, and its influence percolated throughout the social sciences and popular culture in Europe and America.

The late nineteenth century was a period of widespread industrialization and urbanization in Western Europe and the United States. Manufacturing boomed and people crowded into the cities. Social Darwinism, as an ideology, typically sanctioned cutthroat competition in business and disparaged government efforts to help the needy. The advances of civilized life had allowed the unfit to survive and multiply, Spencer claimed, so that they threatened to swamp those responsible for creating modern civilization. To rectify the situation, Spencer urged that government stop interfering in economic and social affairs. Business regulation slowed progress, he claimed, while public health and welfare programs simply harmed people in the long run by preserving the unfit.

Social Darwinism influenced popular culture as well as scientific and social-

scientific thought. Such Gilded Age capitalists as Andrew Carnegie, John D. Rockefeller, and James J. Hill publicly justified their monopolistic business practices in survival-of-the-fittest terms. Opponents of public-health and welfare programs drew on Social Darwinist thinking in shaping European and American public policy throughout the period - leading to U.S. Supreme Court Justice Oliver Wendell Holmes's famous 1905 retort "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statistics*." Holmes wrote these words in a dissenting opinion, however. The Court's majority in that landmark case, *Lockner v. New York*, applied Social Darwinian reasoning to strike down a state work-protection statute.

II. Scientific Racism

Although Darwin stressed the formative role of competition among individuals in his theory of evolution, it constituted but one field of battle for many late-nineteenth-century Social Darwinians. Biologist Ernst Haeckel in Germany and social theorist George Vacher de Lapouge in France, saw competition among races or nations as ultimately more crucial for human evolution than any residual forms of interpersonal competition. As some Social Darwinists called for less government interference in domestic affairs, others championed imperialism, colonialism, and militarism in foreign affairs. Both scientific racism and militant nationalism became hallmarks of Social Darwinism.

Influenced in part by his pessimistic interpretation of Darwinism and reflecting his belief that race had replaced the individual as the locus of human evolution, Lapouge was less sanguine than Darwin about which races would prevail in the ongoing struggle for existence. An anthropologist without standing in his own country but with an influential following in Germany and the United States, Lapouge compulsively calibrated racial hierarchies based on skull shape but worried obsessively that inferior, round-headed races might overrun his superior, long-headed "Aryan" race. "Evolution takes place all around us," he explained in his 1899 book, *L'Aryan*, "it moves forward, pulls back, progresses, regresses, turns and turns again. It does not indefinitely lead toward the better, it leads toward nothing." Such worries, carried to the extreme by a small corp of radical evolutionists, fed a racist variant of eugenics that advocated government policies of ethnic exclusion or elimination.

Although it made little sense from a biological perspective, some Social Darwinists called for militaristic competition among nations. Haeckel argued that nations (like individuals and races) advance through competition, and advocated a strong, unified Germany to dominate the world. "Nowhere in nature," he wrote in his popular 1868 *History of Creation*, "does that idyllic peace exist, of which

poets sing; we find everywhere a struggle and a striving to annihilate neighbours and competitors." Thus, Haeckel stressed, "the whole history of nations ... must therefore be explicable by means of *natural selection*." This Social Darwinian vision of national progress fed German militarism leading up to World War I. During that bloody conflict, Stanford evolutionary biologist Vernon Kellogg - then on a failed peace mission to Europe - concluded that a "Neo-Darwinian struggle-for-existence" mindset propelled the intellectual elite of the German officers' corp. It was a profoundly disquieting discovery for Kellogg, and one that soon helped to launch a religious crusade against evolutionary biology in the United States.

III. Eugenics and the Church

Nationalistic competition, like racial competition, dovetailed with the eugenics movement, which gained momentum following the rediscovery of Mendel's laws of classical genetics in 1900. Eugenics quickly became the focal point of applied human evolution in Northern Europe and throughout the English-speaking world, and remained so at least until the 1930s. It took two complementary forms, positive eugenics (or "more children from the fit") and negative eugenics (or "less from the unfit"). The former was typically voluntary; the latter became increasingly compulsory.

Led by the work of Carnegie Institution biologist Charles Davenport (1866-1944), New Jersey psychologist H.H. Goddard (1866-1957), and British biometrician Karl Pearson (1857-1936), biological and social scientists compiled the staggering toll in crime, degeneracy, and welfare costs allegedly resulting from reproduction by the mentally unfit. They proposed sterilization, sexual segregation, and marriage restrictions as means to address these social problems. Thirty-five American states and most Northern European countries adopted forced sterilization law during the first third of the twentieth century.

Eugenics split the Christian religious community along its modernist/traditionalist fault-line. Modernist or liberal Christians tended to accept a post-millennial vision of a better world evolving on earth through the redeeming influence of the church. Evolutionism was central to their theology. Science served as the God-given vehicle for human progress, many liberal Protestants believed, with eugenics representing perhaps the most promising field of humane scientific research. It held the potential for making people healthier, smarter, more virtuous, and, some added, more Christlike.

Eugenicists actively courted the support of liberal Christians and Jews. In the United States during the 1920s, for example, the American Eugenics Society

(AES) formed a committee for cooperation with clergy that, among other activities, sponsored eugenics sermon contests. These competitions apparently tapped a reservoir of support because they attracted hundreds of sermons from across the country, most submitted by Protestant ministers. The pattern followed in Northern Europe. In England, for example, the Convocation of the Church of England and several key Methodist church leaders endorsed the 1912 Mental Deficiency Bill, a highly controversial eugenics proposal. Leading British eugenicists regularly appealed for support from liberal religious audiences, and William Ralph Inge, the Dean of St. Paul's Cathedral in London from 1911 to 1934, assumed a prominent role in the national eugenics movement.

In sharp contrast, Roman Catholics and conservative Protestants typically assumed an ongoing role for God (not just God's children) in superintending creation. Indeed, the pre-millennial mind-set of many conservative Protestants predisposed them to stress the fallen nature of the physical universe and to see society as sliding toward the abyss. Redemption would come through Christ's miraculous return rather than human scientific, social and cultural progress. Accordingly, during the early twentieth century, at the same time as many liberal Protestants embraced eugenics as a bright promise, many Catholic and conservative Protestants rejected it as a dark threat.

Based on its religious commitment to the sanctity of human life regardless of biological fitness, the Roman Catholic Church emerged as the first major organization to challenge eugenics. The Pope formally condemned eugenics in a sweeping 1930 encyclical on marriage. Biting essays from the pen of popular British author G.K. Chesterton, a convert to Catholocism, did much to undermine support for eugenics among the educated classes throughout the English speaking world. Some conservative Protestants joined with Catholics in voicing religious objections to eugenic legislation. This was especially true in the American South, where there were fewer Catholics and more conservative Protestants than in other regions. The legislative record is littered with comments by individual Protestants denouncing eugenics as unchristian.

IV. Social Darwinism and the Anti-Evolution Crusade

The tie between conservative Protestant opposition to eugenics and the anti-evolution crusade is most evident in the efforts of William Jennings Bryan. More than any other individual, Bryan launched and led the anti-evolution crusade during the early 1920s. A liberal Democrat politician with traditional Presbyterian views on religion, Bryan regularly included eugenics in his litany of damnable consequences of Darwinism. To Bryan, teaching Darwinism as a scientific truth would promote such Social Darwinian practices as *laissez-faire* capitalism,

imperialism, militarism, and eugenics. As early as 1904, Bryan, who built his career on denouncing such practices while defending workers and common people, publically charged Darwinism as "the merciless law by which the strong crowd out and kill off the weak."

At least to his own satisfaction, Bryan's crusade to oust Darwinism from American public schools fit with his overall progressive political orientation. First, he viewed the anti-evolution crusade, like many of his other political causes, as a populist reform movement that sought legislation designed to protect the common people from the elite. Convinced that the people wanted to restrict the teaching of evolution, Bryan believed that the people should rule. Second, Bryan typically saw himself as a Christian with a divine call to public service - the connection between politics and religion was simply more apparent in this case. Both religious and social concerns drove him to launch the anti-evolution crusade and sustained him in prosecuting it. "I object to the Darwinian theory," Bryan observed in 1904, "because I fear we shall lose the consciousness of God's presence in our daily life, if we must accept the theory that through all the ages no spiritual force has touched the life of man and shaped the destiny of nations." About the social consequences of the theory, Bryan stated, "But there is another objection. The Darwinian theory represents man as reaching his present perfection by the operation of the law of hate - the merciless law by which the strong crowd out and kill off the weak."

As a devout believer in peace, Bryan could scarcely understand how supposedly Christian nations could engage in such a brutal war until two scholarly books attributed it to misguided Darwinian thinking. In *Headquarters Nights*, Vernon Kellogg recounted his conversations with German military leaders. "Natural selection based on violent and fatal competitive struggle is the gospel of the German intellectuals," he reported, and served as their justification "why, for the good of the world, there should be this war." Professor Benjamin Kidd's *The Science of Power* further explored the link between German militarism and Darwinian thinking by examining Darwin's influence on German philosopher Friedrich Nietzsche. Bryan regularly referred to both books when writing and speaking against evolutionary teaching.

A third book had an even greater impact on Bryan, and touched an even more sensitive nerve. In 1916, Bryn Mawr University psychologist James H. Leuba published an extensive survey of religious belief among college students and professors. Among students, Leuba reported, "the propotion of disbelievers in immorality increases considerably from the freshman to the senior year in college." Among scientists, he found disbelief higher among biologists than physicists, and higher among scientists of greater than lesser distinction. Leuba did not identify evolutionary teaching as the cause for this rising tide of disbelief

among educated Americans, but Bryan did. "Can Christians be indifferent to such statistics," Bryan asked in one speech. "What shall it profit a man if he shall gain all the learning of the schools and lose his faith in God?"

In 1921, Bryan began speaking widely about the dangers of Darwinian ideas. Characteristically, this thrust was marked by a new speech, "The Menace of Darwinism," which Bryan repeatedly delivered during the remaining years of his life and incorporated into a popular new book, *In His Image*. "To destroy the faith of Christians and lay the foundations for the bloodiest war in history would seem enough to condemn Darwinism," Bryan now thundered, drawing heavily on evidence from Leuba, Kellogg, and Kidd.

V. Social Darwinism and the Scopes Trial

Not having practiced law since his election to Congress in 1890, Bryan largely left the task of actually prosecuting Scopes to the team of state and local lawyers assembled for that task. On the occasions when he spoke, Bryan stressed the social implications of teaching evolution as much as the religious implications of doing so. In this, he believed that the high school science textbook at issue in the case, Hunter's *A Civic Biology*, supplied all the evidence necessary to justify the anti-evolution statute. Hunter's book featured a section on eugenics that identified mental illness and deficiency, alcoholism, sexual immorality, and criminality as hereditary conditions and offered "the remedy" of sexual segregation and sterilization for persons exhibiting them.

Bryan's best opportunity to raise social concerns about teaching evolution came when he argued for excluding testimony for the expert witnesses assembled by the defense. "Your honor, it isn't proper to bring experts in here to try to defeat the purpose of this state by trying to show that this thing that they denounce and outlaw is a beautiful thing," he began. "The Christian believes man came from above, but the evolutionist believes he must have come from below," Bryan said turning toward Darrow. "It is the doctrine that gave us Nietzsche, ... and we have the testimony of my distinguished friend from Chicago in his speech in the Loeb and Leopold case ... pleading that because Leopold read Nietzsche and adopted Nietzsche's philosophy of the superman, that he is not responsible for taking of human life."

In concluding his successful argument against the admission of expert testimony, Bryan took special aim at the liberal theologians assembled by the defense to testify that Darwinism was compatible with Christian faith and morality. "When it comes to Bible experts, do they think that they can bring them in here to instruct members of the jury?" he asked. "The one beauty about the Word of God is, it does not take an expert to understand it." Countless Americans still applaud

Bryan's views on the Bible, morality, and science. For many, the issues raised by the Great Commoner in Dayton are as relevant today as they were eighty years ago.

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9. The Scopes Trial through the Eyes of H.L. Mencken

Harold Ray Stevens

I. Mencken among the Media, Expatriates, and 100% Americans

When I mention the Scopes Trial to literary colleagues in Europe, the immediate point of reference for them is *Inherit the Wind*; and a few will perhaps respond, "Oh, yes, isn't that the trial down in the American South that Mencken wrote about?" Response is frequently more knowledgeable when I mention the Monkey Trial to colleagues in the humanities in the United States; but the basic knowledge about the significance of the trial, if not the issues, remains *Inherit the Wind* and H. L. Mencken, despite recent efforts by such notables as Edward Larson and Richard Cornelius to emend the perception. Approximately 225 journalists covered the Scopes Trial, including such stalwarts as Westbrook Pegler, Joseph Wood Krutch, and several from the *Baltimore Sun* in addition to Mencken: the *Sun*'s editorial board wanted Mencken's mind to run free, and consequently it dispatched additional members of its staff to fill in the gaps that Mencken would necessarily leave.

Mencken's 1920s America was one of conflict, ethical confusion, contending values and bemusement: the Tennessee anti-evolution law, prohibition, bathtub gin, flappers, a wild stock market, political chicanery, challenges to tradition, attempts to repeal the eighteenth amendment, and America's ascendancy as a world power. In addition, forces were out to discredit Comstock's Society for the Suppression of Vice, to dispatch to the nether parts of the universe evangelical Christianity, to substitute ACLU lawyers for clergy and rabbis, to embrace Friedrich Nietzsche, George Bernard Shaw, Charles Lindbergh, and talking movies. Further, Woodrow Wilson, Warren G. Harding and all presidents and most politicians; the League of Nations, bishops, chiropractors, Rotarians, Methodists and Baptists, fellow journalists - all were subjects of Mencken's irony, satire, and sound if often curmudgeonly judgment.

American expatriates - New England Brahmins and their followers primarily of the northeastern corridor's literati and other cultural oases such as San Francisco and Hollywood - left a land blighted by denizens of the Bible Belt that allowed Boobus Americanus - one of Mencken's terms for the uncultured - to run free. Expatriates flocked to the bistros and by-ways of Paris to escape the *ennui* of the American wasteland, with its "gloomy Little Bethels behind the railroad track, of all the fantastic sects that rage where life is drab," what Mencken would call the

home of "100% Americans" in *Heathen Days 1890-1936.*

Mencken had already established himself as the quotable American media voice of the 1920s, primarily through his "Free Lance" columns in the Baltimore *Evening Sun* and his editorship of the *Smart Set.* In addition, the 1920s produced *The American Credo* and five of Mencken's six volumes of *Prejudices*, a series of essays that included versions of "The Sahara of the Bozart," "On Being an American," and "Puritanism as a Literary Force," essays particularly relevant to students of the Scopes Trial. Finally, he founded, edited, and wrote many essays that appeared in *The American Mercury*, which was a major arbiter of taste in 1925.

II. Mencken at Dayton

Mencken's reports provided contexts for discussing the perceived conflict between science and religion, as well as between freedom to pursue a thought or to be denied that freedom. John Scopes referred to his trial as "Mencken's show." His facility with the written word was amazing: the thirteen Scopes Trial reports bear witness to the ease of composition, the humor, the irony, the contentiousness, and the distinctive agenda - in combination rarely the traditional arsenal of reporters. Most of the essays were not written in the best of circumstances because Mencken was an ombibulous person in a very dry county in a purportedly dry country, wishing for the wetter environs of places like Chattanooga, or the more congenial bath-tub gin or cellar-based beer of his Saturday Night Club musical gatherings in Baltimore. Prohibition was a major cause of Mencken's long-term disagreement with Bryan, even though prohibition appears only briefly, and typically in lighter moments of Mencken's commentary. His reports were long and daily during the trial, from 9 July through 18 July, with the exception of 12 July, when he wrote about visiting a religious revival on a mountain top near Dayton, or the Hills of Zion, as he would call them later.

Because little was sacred to Mencken except for the freedom of one's mind and the right to pursue one's thoughts and one's lifestyle freely, he advocated the right of individuals to believe as they wish, but he adamantly opposed anyone who tried to impose values on others. Mencken was hostile to rural America in part because he associated agrarian politics of people such as Bryan with evangelical Protestantism. "Once we get rid of camp meeting rule we'll get rid simultaneously of the Klan, the Anti-Saloon League, and the Methodist Board of Temperance, Prohibition, and public morals," he wrote in 1928. Both Darrow and Mencken wanted to "make a fool out of Bryan," because they believed Bryan was the foremost representative of traditional Christians who wanted to impose their values on everyone. Mencken commented ironically some time after Bryan

died: "God aimed at Darrow, missed, and hit Bryan instead."

III. Mencken's Scopes Trial Essays

A. "Homo Neanderthalensis"

"Homo Neanderthalensis" sets Mencken's tone. Like Swift, he uses hyperbole, satirically and ironically employing an evolutionary term to describe those who would deny the teaching of evolution: arch believers in creationism are the pre-historic remnant of the evolutionary process. "Homo Neanderthalensis" argues Mencken's Nietzschean view that civilized "men of the educated minority" ought to set standards, not "the great masses of men" with their "congenital hatred of knowledge" - who in their non-evolutionary cultural development are "precisely where the mob was at the dawn of history."

B. "Mencken Finds Daytonians Full of Sickening Doubts About Value of Publicity"

To humanize Daytonians, Mencken expresses the uncertainty Daytonians felt about the circus atmosphere in Dayton and the drama unfolding around Rhea Countians: the value of publicity in this publicity-driven trial, with Mencken's favorable impression of Dayton and Daytonians. "The town, I confess, greatly surprised me. I expected to find a squalid Southern village, with darkies snoozing on the horse-blocks, pigs rooting under the houses and the inhabitants full of hookworm and malaria. What I found was a country town full of charm and even beauty - a somewhat smallish but nevertheless very attractive Westminster or Belair."

C. "Impossibility of Obtaining a Fair Jury Insures Scopes' Conviction"

Mencken concludes that even though "the infidel Scopes'" trial will be "conducted with the most austere regard for the highest principles of jurisprudence," and that "no one will be permitted...to pray publicly for his condemnation," or "pull his nose." Nevertheless, religion in Tennessee has fore-ordained the outcome of the trial despite the lack of anger and bitterness by people who have concluded that evolution is "profane, inhumane, and against God."

D. "Mencken Likens Trial to a Religious Orgy, with Defendant as Beelzebub"

The "local primates" - note the continuing ironic use of evolutionary terminology to describe Rhea Countians - have produced a jury "unanimously hot for Genesis," with clergy confident that, once Scopes has been convicted, they will be able to "save" him because he has been duped by conspiratorial scientists who want to "break down religion, propagate immorality, and ... reduce mankind to the level of the brutes." Daytonians, continues Mencken, are simply unable to comprehend a man who rejects a literal interpretation of the Bible - a heresy akin in Maryland to "someone boiling his grandmother to make soap." Mencken reports that the lawn surrounding the courthouse is "peppered day and night" with twenty fundamentalist preachers, all of whom are likened to major-generals in the field artillery, and none of whom will admit even to "typographical errors in Holy Writ." "One longs," Mencken concludes, "for a merry laugh, a burst of happy music, the gurgle of a decent jug."

E. "Yearning Mountaineers' Souls Need Reconversion Nightly" *or* "The Hills of Zion"

Mencken next describes a visit to a Church of God revival in a cornfield near the village of Morgantown, up the mountainside from Dayton. Mencken describes that mountainside revival, complete with "aurochs" of women grinding and speaking in unknown tongues; a tall and gaunt mountaineer minister in overalls caught in "crude torches" and the headlights of a variety of Fords preaching on the day of judgment, when "the high kings of the earth...would all fall down and die; and only the sanctified would stand up to receive the Lord God of Hosts;" a mountain mother suckling her young, observing the pageantry but not participating; people shouting "Glory to God;" a young woman with "bobbed hair" calls for prayer and is piled on and prayed over for an hour with the leader of the gathering beginning "to speak in tongues.... The climax was a shrill, inarticulate squawk.... He fell headlong across the pyramid of supplicants." Returning late to Dayton, Mencken discovers people still gathered in the town square listening to sermons while the "prophet Bryan, exhausted by his day's work for Revelation, was snoring in his bed up the road.... Such" is human existence in the New Jerusalem, "where children are brought up on Genesis and sin is unknown."

F. "Darrow's Eloquent Appeal Wasted on Ears That Heed Only Bryan..."

Darrow's voice and logic "rose like the wind and ended like a flourish of bugles," but Daytonians fit safely and snugly in Bryan's hands because Bryan is at home with his own. Recalling his contrast of the two classes in

an earlier essay, Mencken predicts that Bryan's surrogate, attorney general Tom Stewart, will easily win the case against Scopes not because of reliance on law and precedent, but "by direct appeals to immemorial fears and superstitions of man.... Constitutions, in America, no longer mean what they say.... The rabble is in the saddle."

F. "Law and Freedom ... Yield Place to Holy Writ in Rhea County"

Even though Rhea Countians are "hospitable and ... tolerant," police have been imported from Chattanooga to assure that only members of Scopes' defense team "are free from the constabulary process," because "atheists and anarchists now have public notice they must shut up so long as they pollute this bright, shining, buckle of the Bible belt with their presence." The "*polizei*" captain imported from Chattanooga has pronounced that he is "not going to let any infidels discharge their damnable nonsense upon the town." Mencken predicts that most experts brought in to champion evolutionary science will not be called to testify, and concludes by informing his out-of-state audience not only that Methodists in Dayton are regarded as infidels, but also that the Reverend T. T. Martin has warned Bryan that a "party of I. W. W.'s [International Workers of the World], their pockets full of Russian gold, had started out from Cincinnati to assassinate him....[and that they would then] bump off Bryan and...set fire to the town churches."

G. "Mencken Declares Strictly Fair Trial Is Beyond Ken of Tennessee Fundamentalists"

Mencken praises the testimony of Dr. Maynard M. Metcalf of Baltimore's Johns Hopkins University on behalf of evolution and Scopes. When Metcalf began the major portion of his argument, the jury was excused by the prosecution. Thus the jury, the body charged with the responsibility to render a verdict, was denied access to testimony that would support Scopes. Mencken is incredulous: "In the average Northern jurisdiction much of what is going on here would be almost unthinkable." Bryan's thoughts, on the other hand, remind him of the Holy Roller mountain preacher's anti-education remarks at Morgantown. Bryan, Darrow and Mencken now know that the real battles over evolution will be fought outside of Tennessee, after the Scopes Trial concludes.

H. "Malone the Victor, Even Though Court Sides with Opponents ..."

Malone's oratory enthralled an audience used to good oratory, even if the audience disagreed completely with Malone's eloquent advocacy of

Scopes: Daytonians "are not above taking a voluptuous pleasure in his [Malone's] lascivious phrases," but the "devil's logic cannot fetch them." Mencken contrasts Malone's command of his material to Bryan's faltering response to Darrow's interrogation that led to Bryan's assertion that man is not a mammal. The essay concludes with Mencken disputing "Dayton divines," who argue that knowledge not biblically based is dangerous, a similar argument put forth by chief prosecutor Tom Stewart when asked if the defense did not deserve a chance to argue its case. Mencken incredulously records Stewart's reply: "That which strikes at the very foundations of Christianity is not entitled to a chance."

I. "Tennessee in the Frying Pan"

Dayton "bit off more than it could chew" because the "town boomers" were wrong, anticipating profits and positive press that did not materialize: when the "main guard" of eastern and northern journalists swarmed down to describe the "obscene buffoonery" of the trial, Rhea Countians were reduced only to giving the eastern establishment press "black, black looks." Meanwhile, Daytonians continue to believe Bryan's testimony that they are not mammals, and that, based on the Genesis record, the "earth is flat and ... witches still infest it ... and all who doubt these great facts of revelation will go to hell. So they are consoled."

IV. Mencken's Agenda

Mencken sensed that Bryan was beginning to lose both the dynamism and the resliency that historically were central to his appeal as statesman and divine. In the aftermath of Darrow's cross-examination, Mencken noticed that Bryan was failing physically: his mind seemed to wander; he lacked control of stage presence and argument; he seemed to treat the trial as a camp-meeting, saying "My friends," rather than "Your honor." That touch of pity, however, did not temper Mencken's brutal evaluation of Bryan in the obituary published in the Baltimore *Sun* on 27 July 1925. Mencken is consistent, justifying his words on Bryan by refusing to sentimentalize and to compromise his judgment even in Bryan's obituary. Mencken falters because he wrote this abuse at an inappropriate time and without the saving grace of irony, humor, and satire. The *Sun* recognized that Mencken's rancor was excessive, because it ran a traditional and sympathetic obituary concurrently.

Mencken, like most people associated with the Scopes Trial, arrived in Dayton with an agenda, and the record is history. As this symposium confirms, Mencken was correct when he wrote, on the final day of the trial: "No doubt the case will be long and fondly remembered by connoisseurs of the judicial delicatessen."

10. From History to Folklore to Legal Precedent: The Scopes Trial and *Inherit the Wind*

Edward J. Larson

I. Inherit the Wind

It may be the most famous scene in the legendary encounter between science and religion to occur in American history or folklore. A mob of townspeople stirred by the preaching of Rev. Jeremiah Brown – whose name evokes images of the fanaticism of the biblical Jeremiah and the abolitionist John Brown – drags a young science teacher from his public-school classroom and throws him in jail for telling his students about the Darwinian theory of human evolution. Even though the teacher is named Bert Cates and the town called Hillsboro, viewers surely equate him with John Scopes and transpose the scene onto the historic events that transpired in Dayton, Tennessee, during the summer of 1925. It makes for powerful drama - a scene seared into the national consciousness - but it never happened that way.

It was no witch hunt led by a fundamentalist firebrand, but a bizarre publicity stunt concocted by secular civic leaders. Earlier in 1925, the Tennessee state legislature had passed a statute making it a misdemeanor, punishable by a maximum fine of $500, for a public school teacher "to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man had descended from a lower order of animal." Upon learning of the restriction, the fledgling American Civil Liberties Union (ACLU) in New York City issued a press release offering to assist any teacher willing to challenge the constitutionality of the new law in court. Although technically he was arrested, Scopes was neither jailed nor threatened with imprisonment – and spent much of the time until his trial traveling and talking with reporters. He did not even teach biology and had probably never violated the new law, but Scopes offered a convenient defendant for the Dayton civic leaders who hoped that staging a highly publicized test case would attract visitors, and maybe business investment, to their town.

II. Matthew Harrison Brady - William Jennings Bryan

In *Inherit the Wind*, Bryan (called Matthew Harrison Brady in the script) appears almost out of thin air. The audience learns simply that he ran for president three

times, remained an influential political orator, and retained a fundamentalist faith in the Bible. The real-life Bryan did much more than insinuate himself into the Scopes trial – he all but ignited that spotlight by focusing public attention on the social implications of Darwinism.

Bryan, a political liberal with decidedly conservative religious beliefs, came to see Darwinian survival-of-the-fittest thinking (known as Social Darwinism when applied to human society) behind excessive militarism, imperialism, and laissez-faire capitalism - the three greatest sins in Bryan's political theology. With his Progressive political instinct of seeking legislative solutions to social problems, Bryan called for the enactment of state restrictions against teaching the Darwinian theory of human evolution in public schools. Indeed, it had all the trapping of a political campaign as Bryan spoke, wrote, and lobbied for such laws across America during the early 1920s.

In Inherit the Wind, the Darrow character accounts for the late-in-life antievolutionism of his once-liberal adversary with the words, "A giant once lived in that body. But Brady [Bryan] got lost. Because he was looking for God too high up and too far away." Bryan's best biographer, Lawrence Levine, rejected this view. "In William Jennings Bryan, reform and reaction lived happily, if somewhat incongruously, side by side," Levine concluded. "The Bryan of the 1920s was essentially the Bryan of the 1890s: older in years but no less vigorous, no less optimistic, no less certain."

III. Henry Drummond - Clarence Darrow

Inherit the Wind provides a fuller rational for the participation of Clarence Darrow (or Henry Drummond, as he is called) in the small-town misdemeanor trial than it did for Bryan's appearance in it, but even here details diverge sharply from the historical record. By the twenties, Darrow unquestionably stood out as the most famous – some would say infamous – trial lawyer in America. Born into an educated, working-class family in rural Ohio, Darrow first gained public notice in the 1890s as a Chicago city attorney and popular speaker for liberal causes. Darrow took up the cause of labor, beginning with the defense of famed Socialist labor leader Eugene V. Debs against criminal charges growing out of the 1894 Pullman strike. A dramatic 1911 murder trial involving two union leaders accused of blowing up the Los Angeles Times building tarnished Darrow's reputation with labor when the lionized defendants confessed their guilt to avoid the death penalty.

Thereafter, Darrow gradually shifted his practice to criminal law, defending an odd mix of political radicals and wealthy murderers. These activities kept

Darrow's name in newspaper headlines, such as during the 1924 Loeb-Leopold case, one of the most sensational trials in American history. In it, Darrow used arguments of psychological determinism (informed by notions of evolutionary naturalism) to save two wealthy and intelligent Chicago teenagers from execution for their cold-blooded murder of an unpopular schoolmate, a crime that the defendants apparently committed for no other reason than to see if they could get away with it.

In the courtroom, on the lecture circuit, in public debates, and through dozens of popular books and articles, Darrow spent a lifetime ridiculing traditional Christian beliefs. He called himself an agnostic, but he sounded like an atheist. In this, he imitated his intellectual mentor, nineteenth-century American social critic Robert G. Ingersoll, who wrote, "The Agnostic does not simply say, 'I do not know [if God exists].' He goes another step, and he says, with great emphasis, that you do not know. . . . He is not satisfied with saying that you do not know – he demonstrates that you do not know, and he drives you from the field of fact."

Unlike the story in *Inherit the Wind*, Mencken's newspaper did not send Darrow to Dayton – he came on his own ticket. Coincidentally Mencken and Darrow were together when word of the pending trial first broke, and they discussed whether Darrow should defend Scopes. The 68-year-old attorney had just announced his retirement, however, and let the matter pass. The ACLU would not want his help anyway, Darrow surmised, because his zealous agnosticism might transform the trial from a focused appeal for free speech to a divisive assault on biblical religion. Scopes need not (and did not) ask Mencken's newspaper to obtain defense counsel for him because he only agreed to test the law after the ACLU offered to defend him. It was the ACLU's case from the start, and Darrow would not have joined it if Bryan had stayed out. Once he did, however, Darrow demanded in.

Other attorneys, who actually argued more of the case than Darrow, and the ACLU itself are never mentioned in *Inherit the Wind*. The omission simplifies the script, of course, but it also serves another purpose. As they later explained, Jerome Lawrence and Robert E. Lee wrote the play during the mid-1950s as a means of awakening public concern about the innocent victims of the mass hysteria then feeding McCarthy Era assaults on alleged communists and leftists. Because the ACLU remained a much maligned target of those assaults, identifying its role in the Scopes trial would have made it harder to portray Scopes as an innocent victim. Thus the ACLU disappeared from the legend of its own most famous trial.

IV. The Trial of the Century

The prospect of these two renowned orators – Bryan and Darrow – actually litigating the profound issues of science versus religion and academic freedom versus popular control over public education turned the trial into a media sensation then and the stuff of legend thereafter. News of the trial dominated the headlines during the weeks leading up to it and pushed nearly everything else off American front pages throughout the eight-day event. Two hundred reporters covered the story in Dayton, including some of the country's best correspondents representing many of the major newspapers and magazines. Thousands of miles of telegraph wires were hung to transmit every word spoken in court, and pioneering live radio broadcasts carried the oratory to the listening public. Newsreel cameras recorded the encounter, with the film flown directly to major Northern cities for projection in movie houses. The media billed it as "the trial of the century" before it even began, and it lived up to its billing.

The courtroom arguments and speeches by both sides addressed the nation rather than the jurors (who missed most of the oratory anyway because it had so little to do with the facts of the case that it was delivered with the jury excused). The defense divided its arguments among its three principal attorneys. Hays focused on the standard ACLU arguments that Tennessee's antievolution statute violated the individual rights of teachers. Malone, a liberal Catholic, mostly argued that the scientific theory of evolution did not necessarily conflict with an open-minded reading of Genesis. Darrow, for his part, concentrated on debunking fundamentalist reliance on revealed scripture as a source of knowledge about nature suitable for setting education standards. Elements from all three lines of argument appear in the words attributed to Drummond [Darrow] in *Inherit the Wind*, which makes him sound unduly tolerant of Christian beliefs when he gives voice to arguments originally articulated by Hays and Malone.

The prosecution countered with a half-dozen local attorneys led by the state's able prosecutor and future U.S. senator, Tom Stewart, plus Bryan and his son, William Jennings Jr., a California lawyer. In court, they focused on proving that Scopes broke the law and objected to any attempt to litigate the merits of that statute, mainly because they could not find expert witnesses opposed to the theory of evolution capable of matching those assembled by the defense in support of that theory. *Inherit the Wind* gives due billing to Stewart (under the name Tom Davenport), but the other local prosecutors and the younger Bryan disappear in that account. The elder Bryan, who had not practiced law for three decades, stayed uncharacteristically quiet in court, and saved his oratory for lecturing the assembled press and public outside the courtroom about the vices of teaching evolution and the virtues of majority rule. He also prepared a thunderous three-hour-long address on these points that he planned to deliver as the prosecution's

closing argument. As the actual trial played itself out, however, Darrow managed to frustrate Bryan's plan by waiving his own close because, under Tennessee practice, the defense controlled if there were closing arguments. In this and other major scenes from the trial, events unfolded roughly in the order presented in *Inherit the Wind.*

V. The Trial Unfolds

No sooner was the jury selected than it was excused from the courtroom - for days - as the parties wrangled over defense motions to strike the statute as unconstitutional. Although these arguments occasionally soared into dramatic pleas for either individual freedom or majority rule, their technical nature makes them difficult to follow by non-lawyers. The trial judge denied the motions anyway. *Inherit the Wind* skips ahead to the prosecution's case, which actually was simpler even than portrayed in that account.

The scene begins with a school boy named Howard (Howard Morgan in the actual trial) testifying that Scopes taught his class about evolution. On cross-examination, Drummond [Darrow] asks Howard the famous question, "Did it do you any harm?" and coaches out a denial. Dropped from the legend is Bryan's telling retort, "Mr. Darrow asked Howard Morgan, 'Did it hurt you?' Why did he not ask the boy's mother?" Instead, the play inserts testimony from Cates's [Scopes'] fictional fiancee, who Brady [Bryan] mercilessly grills about Cates's agnosticism. In 1960, when paid to tout the movie for its makers, Scopes dismissed this female part with the words, "They had to invent romance for the balcony set." More likely, the writers created the scene to discredit McCarthy Era inquisitions of the family and friends of alleged communists. It gives a dark taint to the trial wholly missing from the actual episode, in which Scopes had to instruct his students how to testify that he had violated the law.

Following the prosecution's brief presentation, the defense offered the testimony of fifteen experts in science and religion, all prepared to testify against the statute. The prosecution immediately objected. The admissibility of such testimony was the key issue at trial. It passes quickly in *Inherit the Wind* but consumed days at trial. The script captures the heart of the matter, however. "Their testimony is basic to the defense of my case," Drummond [Darrow] pleads. "For it is my intent to show this court that what Bert Cates [John Scopes] spoke quietly one spring afternoon in the Hillsboro [Dayton] High School is no crime! It is incontrovertible as geometry in every enlightened community of minds!" Brady [Bryan] formally objects to the testimony as irrelevant to the question of whether Cates [Scopes] violated the law. He then adds his real complaint, "And I refuse to allow these agnostic scientists to employ this courtroom as a sounding board, as a

platform from which they can shout their heresies into the headlines!" The judge predictably sided with the prosecution. Stage directions for *Inherit the Wind*, however, instruct Drummond [Darrow] to appear "flabbergasted" and to look around "helplessly" until "There's a glint of an idea in his eye."

VI. Bryan's Testimony

The glint of an idea sets up the most dramatic moment of *Inherit the Wind*: The defense calls Brady [Bryan] to the stand as a expert on religion. It was equally dramatic at the actual trial, although Darrow had quietly planned it for days. It became the most famous scene in American legal history or folklore. And it really happened, though not quite as portrayed in *Inherit the Wind*.

Actually it was Hays who called Bryan as the defense's final expert on the Bible; the volunteer prosecutor proved cooperative. Up to this point, Stewart had masterfully limited the proceedings and, with help from a friendly judge, confined his wily opponents. But Stewart could not control his impetuous co-counsel, especially because the judge seemed eager to hear Bryan defend the faith. At least one of the local prosecutors formally objected. Stewart seethed with anger. But Bryan in vain and with vanity welcomed the opportunity to face his adversaries. "They did not come here to try this case," Bryan explained early in his testimony. "They came here to try revealed religion. I am here to defend it, and they can ask me any questions they please."

Thinking the trial all but over, except for the much awaited closing oratory, and hearing that cracks had appeared in the ceiling below the overcrowded, second-floor courtroom, the judge had moved the afternoon session outside, onto the courthouse lawn. The crowd swelled as word of the encounter spread. From the 500 persons that evacuated the courtroom, the number rose to an estimated 3000 people spread over the lawn – nearly twice the town's normal population. The participants appeared on a crude wooden platform erected for the proceedings, looking much like Punch and Judy puppets performing at an outdoor festival. Enterprising youngsters passed through the crowd hawking refreshments. "Then began an examination which has few, if any, parallels in court history," the *Nashville Banner* reported. "In reality, it was a debate between Darrow and Bryan on Biblical history, on agnosticism and belief in revealed religion."

Darrow posed the well-worn questions of the village skeptic: Did Jonah live inside a whale for three days? How could Joshua lengthen the day by making the sun (rather than the earth) stand still? Where did Cain get his wife? In a narrow sense, as Stewart persistently complained, Darrow's questions had nothing to do with the case because they never inquired about human evolution. In a broad

sense, as Hays repeatedly countered, they had everything to do with it because they challenged biblical literalism. Best of all for Darrow, no good answers existed to them. They compelled Bryan "to choose between his crude beliefs and the common intelligence of modern times," Darrow later observed, or to admit ignorance.

As Darrow pushed his various lines of questioning, Bryan increasingly admitted that he simply did not know the answers. He had no idea what would happen to the earth if it stopped for Joshua, or about the antiquity of human civilization, or even regarding the age of the earth. "Did you ever discover where Cain got his wife?" Darrow asked. "No sir; I leave the agnostics to hunt for her," came the bittersweet reply.

Inherit the Wind grossly simplifies this encounter, and in doing so, transforms Brady [Bryan] into a mindless, reactionary creature of the mob. He assails evolution solely on narrow biblical grounds (never suggesting the broad social concerns that largely motivated him) and denounces all science as "Godless," rather than only the so-called false science of evolution. Rather than acknowledge his "day-age" interpretation of the Genesis account, Brady [Bryan] steadfastly maintains on alleged biblical authority that God created the universe in six 24-hour days beginning "on the 23rd of October in the Year 4,004 B.C. at - uh, at 9 A.M.!" The crowd gradually slips away from him as he babbles on, reciting the names of books in the Old Testament. "Mother. They're laughing at me, Mother!" Brady [Bryan] cries to his wife at the close of his theater testimony. "I can't stand it when they laugh at me!" Even though Bryan actually opposed including a penalty provision in anti-evolution laws, *Inherit the Wind* ends with his character ranting against the small size of the fine imposed by the judge and then fatally collapsing in the courtroom when the now hostile crowd ignores his closing speech. "The mighty Evolution Law explodes with a pale puff of a wet firecracker," the stage directions explain, just as McCarthyism died from ridicule.

As Lawrence and Lee debunk Brady [Bryan] in the eyes of the audience, they uplift Drummond [Darrow]. Left alone in the courtroom at the end, Drummond [Darrow] picks up the defendant's copy of *The Origin of Species* and the judge's Bible. After "balancing them thoughtfully, as if his hands were scales," the staging directions state, the attorney "jams them in his briefcase, side by side," and slowly walks off the now-empty stage.

Thus the writers reduce Bryan and Darrow to one-dimensional caricatures of themselves, and simplify the trial into a three-act morality play in which tolerance happily triumphs over bigotry. To insure that viewers appreciate this point, the writers have Cates [Scopes] ask Drummond [Darrow] after the jury convicts him, "Did I win or did I lose?" Drummond [Darrow] answers, "You won. . . . Millions

of people will say you won. They'll read in their papers tonight that you smashed a bad law. You made it a joke!" In reality, of course, Scopes was convicted of violating Tennessee's anti-evolution law and the statute was upheld by the state supreme court on appeal. This result was probably inevitable because the United States Supreme Court did not then interpret the federal constitutional protections for free speech and against the establishment of religion to apply to actions by state and local governments.

VII. Legal Legacy

Yet a legend repeated often enough can make its own reality in the public consciousness, and that happen with the Scopes trial. In the decades after Scopes, the United States Supreme Court gradually embraced the ACLU views that the federal constitution should zealously protect free speech from governmental restriction and shield dissenters from state-sponsored religious practices and influences. Not only did the First Amendment grow to cover state action, but during the 1950s and 60s Supreme Court justices interpreted it to bar all but the most compelling government restrictions on its enumerated rights, including speech and religious freedom. And perhaps because the Scopes episode had cast religious lawmaking as the source of majoritarian oppression, those justices appeared particularly suspicious of statutes and government practices supportive of Christianity. These legal developments made anti-evolution statutes seem virtually unAmerican by the 1960s even though they were still on the book in Tennessee and some other Southern states. Even creationists began seeking other avenues of recourse against Darwinian teaching: Balanced treatment for their ideas now appeared more appropriated than censoring their opponents. The role played by the Scopes legacy in these legal developments was particularly evident in the High Court's handling of those old statutes.

By the 1960s, federal courts had long since stopped using the Fourteenth Amendment to strike down progressive state economic regulations and instead started using it to void repressive state social legislation. The process began the same year as the Scopes trial, when the Supreme Court first ruled that the "liberty" protected from state infringement by the Due Process Clause incorporated the First Amendment right of free speech. It took over twenty years before the High Court added the Establishment Clause to the rights incorporated into the Fourteenth Amendment. Once it did, however, the Court quickly began purging such well-entrenched religious practices and influences from public schools as bible reading, religious instruction, and daily prayers. These rulings provided solid authority for effectively challenging anti-evolution statutes under the federal constitution. The Scopes legend did the rest when such a case finally reached the Supreme Court in 1967, after the ACLU joined in bringing a declaratory judgment

action against Arkansas's 40-year-old but rarely used anti-evolution statute.

Echoes of the Scopes trial resounded throughout the case when it reached the Supreme Court. The plaintiffs' principal brief to the Court closed with a dramatic reference to "the famous Scopes case" in Tennessee, and the "darkness in that jurisdiction" that followed it. The state countered by appealing to the authority of the Scopes decision and closed with extended excepts from the Tennessee Supreme Court opinion in that case. The ACLU brief began, "The Union, having been intimately associated with *Scopes v. Tennessee* 40 years ago, when this issue first arose in the courts, looks forward to its final resolution in this case."

In the resulting opinion, Fortas set the Court's holding squarely in the context of the Scopes case, beginning and ending with references to it. He conceded that the Arkansas statute "is presently more a curiosity than a vital fact of life," yet he held that it violated the Establishment Clause because of its original purpose. "Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose," he wrote, "to make it unlawful 'to teach any theory that denies the story of Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.'" Never mind that this language did not appear in the Arkansas statute, the Tennessee law was equally on trial now. To support his analysis of the statute's historical purpose, Fortas cited the memoirs of Darrow and Scopes, a book by Richard Hofstadter, and a thirty-year-old pamphlet by the ACLU – all of which reflected the legend of Scopes more than the actual trial. Religious purpose alone became the Court's basis for striking the law. In part because of Fortas's opinion, having "a secular legislative purpose" became a separate test for Establishment Clause violations, reflecting Fortas's conviction that the Clause simply must cover the Scopes situation.

In 1985, the Fifth Circuit federal court of appeals voted to strike down a Louisiana statute requiring balanced treatment for creation and evolution in public school science classes – a decision later upheld by the Supreme Court. Circuit court judges on both sides of this ruling – and the court split 8 to 7 – invoked the legend of Scopes. All but lifting a line out of *Inherit the Wind*, Judge Thomas Gee complained, "The Scopes court upheld William Jennings Bryan's view that states could constitutionally forbid teaching the scientific evidence for the theory of evolution, rejecting that of Clarence Darrow that truth was truth and could always be taught – whether it favored religion or not." Neither Bryan nor Darrow ever took such positions in Dayton – but Brady and Drummond did in the fictional Hillsboro. Indeed, it is hard to imagine that Darrow could have conceived of scientific truth ever favoring revealed religion or Bryan believing that valid scientific evidence supported the theory of human evolution.

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11. The Tennessee Supreme Court Appeal and Other Post-Trial Activities of Key Scopes Trial Participants

Randy Moore

I. The Verdict

The Scopes trial, a "trial of the century" that was started for economic reasons and fostered for political ones, ended abruptly at noon on 21 July 1925 with Scopes' conviction. Newspapers throughout the country ran headlines similar to the one in Dayton's local newspaper: "Jury Returns Verdict of 'Guilty' in Scopes Case." Most accompanying stories summarized the trial, which the *Dayton Herald* described as "a world-watched, nation-wide drama" that was "the bitterest legal battle ever waged in the United States."

On the day after the trial, many newspapers printed a list of questions that Bryan had given to Darrow, as well as Darrow's responses. In those answers, Darrow lived up to his claim of being an agnostic, noting that he did not believe in Bryan's god, did not believe in miracles, and could find no evidence of the immortality of the soul. An Oklahoma newspaper raised Bryan's hand in victory, noting that "Mr. Bryan came out more than victorious. He made a monkey out of the defense counsel and left them gasping." Others, however, disagreed; for example, the *New York Times* described Bryan's performance as "absurdly pathetic," and the *Arkansas Gazette* noted that "for the state of Tennessee, the Scopes trial has been a moral disaster. It will plague the citizen of Tennessee wherever he may go."

II. The Appeal: *John Thomas Scopes v. The State of Tennessee*

For several months after the verdict Scopes' legal team was plagued by chaos, infighting, and dissent. As some of Scopes' supporters began lobbying to remove Darrow from the case, John Neal (chief defense counsel of record) filed two petitions in Federal Court in Chattanooga seeking to halt enforcement of the Butler Law based on two violations of the Fourteenth Amendment: denial of property without due process and denial of equal protection of the law, despite the fact that Scopes had already left Tennessee. Neal and Darrow also requested a federal restraining order on behalf of a Rhea County resident who claimed that the Butler Law robbed his children of a proper education.

Despite the protests, Scopes, who considered Darrow to be "a genius," stood by Darrow, and Darrow - whom, with Malone, Scopes referred to as "class-A sluggers" - remained on the appeal team. The state's defense of Scopes' conviction was led by Frank M. Thompson, Tennessee's newly elected Attorney General. Thompson received many offers of assistance from attorneys and other people, including William Jennings Bryan, Jr., and Tennessee's Governor Austin Peay, a staunch Baptist who believed that the teaching of evolution converted students to agnosticism.

The hearing of Scopes' appeal before the Tennessee Supreme Court began in Nashville on 31 May 1926. The brief that had been filed earlier repeated points raised during the trial - namely, that the Butler Law was unconstitutional because it violated religious equality, violated the due-process and equal-protection clauses of the Constitution, was too vague, and was too arbitrary to be a valid law. Scopes' brief also questioned the validity of Judge Raulston's exclusion of the testimony by scientists. The state's 400-page reply dismissed these claims as trivial and incomplete while claiming that the Butler Law was valid while noting that the United States is a Christian nation, that there was no valid evidence for evolution, and - in a clear tribute to the fallen Bryan - that the public should control the public schools.

Scopes, who was spending the summer of 1926 working on glacial geology for the Illinois Geological Survey, had not taken the witness stand at his original trial, and did not return to Tennessee for the two-day hearing; as he told one reporter, "I'm not interested in the outcome, and [want] to forget the entire episode." Even without Scopes, however, the courtroom was packed.

With Butler and Rappleyea sitting on the front row, the hearing began with the state hoping to establish guilt by association by stressing Darrow's agnosticism, the ACLU's radicalism, and Darrow's treatment of Bryan during the trial. The state argued that the legislature had tried to preserve the Bible for all faiths (not just fundamentalists) and cited Bryan's Last Message. The defense responded with the only argument it had; namely, that the Butler Law was unconstitutional because it unreasonably restricted the liberty of teachers and students by establishing a preference in public schools for a particular religion. True to form, Darrow chided the fundamentalists with his now-famous line: "With flaming banners and beating drums, we march back to the glorious ages of medievalism."

The defense begged for teachers to be given the freedom to educate students, noting that the teaching of evolution would not cause students to lose faith in God. The state, in addition to using Darrow's earlier defenses of murderers and Communists to link the acceptance of evolution with the acceptance of murder and communism, responded by claiming that the Butler Law had a secular

purpose. The state then argued that the ACLU's interest in the case resulted from a pro-Communist agenda, to which the defense responded that the Butler Law promoted fundamentalism and that there is no conflict between the acceptance of evolution and man's divine origin. The gallery cheered when the state's attorney, invoking Bryan's majoritarianism legacy, reminded the Supreme Court Justices of the popularity of life-after-death among Tennesseeans and that evolution undermined their faith. Darrow's hour-long response, which linked science with progress, stressed that religion should be a personal issue. Darrow argued that science teachers should teach science, not religion, and concluded - to applause - with a defense of individualism: "We are once more fighting the old question, which after all is nothing but a question of intellectual freedom of man."

None of the original principals in the Scopes trial was present when, on 15 January 1927, the Tennessee Supreme Court announced its split decision. Of the five Supreme Court justices, one (Justice W. H. Swiggart, Jr.) disqualified himself because, as a former assistant state attorney general, he had earlier helped argue the prosecution's case. The four remaining Justices produced three written opinions. Speaking for Justice W. L. Cook, Chief Justice Grafton Green admitted that the Butler Law "was not drafted with as much care as could have been drafted" and that Scopes' brief was "exceptionally able," but upheld the validity of the Butler Law, describing it exactly as Raulston and Stewart had at Scopes' original trial. Green's opinion claimed that 1) the act was not vague, 2) the "due process clause" of the State and Federal Constitutions did not apply to public employment, in which the State has the same right to impose the conditions of employment as a private employer would have under similar circumstances, 3) Scopes' liberty to teach and discuss the theory of evolution outside of the classroom was not affected by the law, and 4) the state's ban on teaching human evolution did not give preference to any religion because "there is no religious establishment or organized body that has in its creed or confession of faith any article denying or affirming" that humans had descended from a lower order of animals. Justice Alexander W. Chambliss agreed that the law was constitutional and argued that the law was confined to materialistic (and not theistic) evolution, noting that teachers could teach evolution if they did not deny a role for God in the process. Justice Colin McKinney's short opinion argued that the Butler Law was invalid because it was "so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application." Thus, a majority of the court upheld the locally-popular Butler Law as constitutional because 1) it did not infringe on Scopes' individual liberties, and 2) it required the teaching of nothing and therefore did not give preference to any religion.

On the last day of the original Dayton trial, the question of who should impose the fine had been discussed, and both sides agreed not to raise the issue on appeal. Raulston had given the jury the chance to set a higher fine, but he established the

$100 fine that Scopes received. However, according to Tennessee law, fines greater than $50 were to be set by the jury, not the judge. In light of this procedural error, the Tennessee Supreme Court went outside the assignments of error and contentions raised by Scopes' appeal team by ruling that Scopes was entitled to a retrial, but added that because Scopes was no longer employed by the state, that the "peace and dignity of the state" would be best served by the entry of a nolle prosequi of "this bizarre case." Attorney General Stewart, without comment, complied the next day, thereby leaving the ACLU with no conviction to appeal and closing Darrow's hoped-for route to the U.S. Supreme Court.

III. The Aftermath of the Scopes Trial

Soon after Scopes' trial, the governor of Mississippi predicted that his state, like Tennessee, would ban the teaching of evolution in its public schools. Supporters of antievolution legislation in Mississippi warned that the teaching of evolution would hurt the state and undermine Christianity, and claimed that 90% of Mississippians supported the legislation; one prominent supporter claimed that it was better have the leadership of one Christian mother than all the scientists in the world. When the legislature reconvened, the governor's prediction came true, as it also did in Arkansas. The ACLU repeatedly offered to support a teacher to challenge Mississippi's antievolution statute, but there were no volunteers. The Mississippi statute, which later became the last surviving anti-evolution law, was not overturned until December 21, 1970.

There were victories for the antievolutionists in 1926-27. For example, fiery Texas fundamentalist Frank Norris helped drive pro-evolution professors from Baylor University (his alma mater) and Southern Methodist University, and administrators at Kentucky Wesleyan College suspended five professors who denied that evolution contradicts the Bible. However, antievolution activists also suffered some defeats.

In Missouri, a legislator jokingly proposed that violators of a proposed antievolution statute would be imprisoned "for not less than thirty days nor more than forty nights in the St. Louis Zoo," and another proposed that the law apply only to areas whose citizens believed that "the earth is flat, that the sun travels around the earth, and that the storms of the sea are caused by the fury of the monsters of the deep." In Delaware, an anti-evolution law was referred to the Committee on Fish, Game, and Oysters. Despite this sarcasm, these antievolution efforts were only narrowly defeated. The Oklahoma legislature repealed its antievolution law in 1925, and defeated another antievolution bill in 1927. Similar legislation in Florida, Delaware, Maine, Minnesota, and elsewhere also failed as fundamentalists redirected their attacks to other societal ills, including the evils of

booze. Bryan's earlier claim that the "movement [to ban the teaching of evolution will] sweep the country and drive Darwinism from our schools" never fully materialized.

The demise of the Butler Law began in April, 1967 when the Campbell County Board of Education fired Jacksonville, Tennessee, science teacher Gary Lindle Scott for violating the Butler Law and allegedly referring to the Bible as "a bunch of fairy tales." On May 11, the Campbell County Board of Education - facing a storm of bad publicity and high legal expenses for its decision to fire Scott - voted to reinstate Scott. Scott accepted their offer, but a few days later his attorneys filed a class-action lawsuit challenging the Butler Law; the suit included Scott, 2 of his students, 59 Tennessee teachers, and the National Science Teachers Association. When Scott offered to drop his lawsuit if the state would repeal the Butler Law, the Tennessee House of Representatives began debating a repeal of the law. As a monkey watched from the well of the House, only two representatives defended the law, and the bill (House Bill 48) passed by a vote of 58-27. After some rewording, the repeal bill passed the Senate on May 16 by a vote of 20-13. Two days later, the repeal was made official when Tennessee Governor Buford Ellington signed Tennessee House Bill 48 into law, thereby ending the Butler era.

IV. Post-trial Activities of Some of the Trial's Participants

A. John T. Scopes

Scopes received thousands of letters, including proposals for marriage, an offer to become a minister of a new church and "Bishop of Tennessee" with "pontifical powers," lucrative offers to give lectures and star in movies, and all sorts of advice for salvation. Scopes burned the letters (most of them unopened), refusing to cash-in on his accidental fame; he declined all of the offers, noting that he simply wanted "peace and emotional stability."

Scopes was hired by Gulf Oil and sent to do fieldwork in northwest Venezuela near the city of Maracaibo. There, at a dance, Scopes met Mildred Walker, "a pretty brown-eyed brunette from South Carolina" (and fellow employee of Gulf Oil). Walker, whose aunt "thought that Scopes was something with horns," married Scopes in a Catholic service in February, 1930 in Maracaibo. In 1933, Scopes, who described himself as agnostic, returned to Texas (and later to Louisiana) to work for United Gas Corporation. John and Mildred Scopes had two sons, William and John Jr., both of whom worked in the insurance industry and are now retired.

Their father never spoke with them about evolution or his famous trial.

When the movie version of *Inherit the Wind* opened in 1960, Scopes - at the urging of his wife - accepted producer Stanley Kramer's invitation to attend the film's North American premiere at the Dayton Drive-In Movie on the 35th anniversary of the trial. Scopes was the only surviving principal of the trial who attended; most of his trial's principals were dead. Back in the town that made him famous, Scopes bought a "Scopes soda" and a "Simian soda" that were "priced now as then in honor of Scopes' return to Dayton" (i.e., 15 cents). Although a local preacher denounced Scopes as "the devil," other festivities - including a parade, concert, and car show - were more cordial. Mayor J. J. Rogers - in front of the second-largest crowd in Dayton's history - gave him a key to the city and proclaimed the day Scopes Trial Day.

Scopes retired in 1963, and four years later published his memoirs, *Center of the Storm: Memoirs of John T. Scopes*. In 1968, Scopes began publicizing his book with interviews and an appearance on The Tonight Show with Johnny Carson. When asked about Inherit the Wind, Scopes noted that the controversy would "go on, with other actors and other plays." When Scopes spoke about the issues associated with his famous trial, his message did not waiver: "The basic freedoms of speech, religion, academic freedom to teach and to think for oneself defended at Dayton are not so distantly removed; each generation, each person must defend these freedoms or risk losing them forever."

Scopes, a heavy smoker, died of cancer in Shreveport, Louisiana on October 21, 1970. His remains were returned to Paducah, Kentucky, and buried beneath the inscription "A Man of Courage," a phrase used to describe Scopes by Clarence Darrow.

B. Clarence Darrow

Soon after the trial, Darrow and his wife Ruby left Dayton. However, Darrow - the nation's most famous criminal attorney - was growing tired and participated in only a few more cases. In Detroit, Darrow was assisted by Arthur Garfield Hays in the defense of Dr. Ossian Sweet, an African American charged with murdering a member of an angry mob that had assembled outside his house. Sweet was acquitted by an all-white jury after Darrow gave an eight-hour closing argument that was "one of the strongest and most satisfying arguments that [I'd] ever delivered." He then, again with Hays, helped obtain acquittals for two Italians charged with murder in New York, after which he spent a year in Europe and

"learned to loaf." After the Depression wiped out most of his retirement savings, Darrow went to Honolulu for his last case – the "Massie Case," in which Darrow defended four men accused of killing a young Hawaiian man. Darrow's closing argument was broadcast live throughout the United States. Darrow later observed that Honolulu was "the only place I ever visited that turned out better than I expected."

Darrow, who believed that Bryan's religion made Bryan the "idol of all Morondom," continued to write and speak about evolution, prohibition, and personal liberty. When Darrow returned to Dayton in 1938 and saw a church being built across the street from Robinson's Drug Store (i.e., where the Scopes Trial originated), he admitted, "I guess I didn't do much good here after all." On his 79th birthday Darrow made a sentimental return to his childhood home in Ohio. In weeks that followed, Darrow became increasingly ill, confused, and irresponsible, and his last days were painful and ugly. Darrow died of heart disease at age 80 in Chicago on March 13, 1938, in his home on East 60th Street overlooking Jackson Park. Darrow's ashes were scattered from a bridge into Jackson Park Lagoon, which is just south of Chicago's Museum of Science and Industry (at the intersection of East 57th Street and South Lake Shore Drive). At a ceremony held on May 1, 1957, the bridge was named the Clarence Darrow Memorial Bridge.

C. William Jennings Bryan

Bryan's death in Dayton just five days after the Scopes trial was the most dramatic post-trial event. His memorial service in Dayton was held on the lawn of the Rogers home where he died, and was officiated by Reverend C. R. Jones, the pastor of Dayton's First Southern Methodist Church in which Bryan made his last public appearance. The mayor of Dayton proclaimed a day of mourning, and all of Dayton's flags were flown at half-mast. Bryan's funeral was a national event broadcast nationwide on radio. Crowds of mourners lined railroad tracks to see the special Pullman car that carried Bryan's body to Virginia for burial. Thousands saw Bryan's body in Dayton, the nation's capital, and various cities along the railway route. Bryan's funeral service was conducted at New York Avenue Presbyterian Church, "The Church of the Presidents." The Rev. Dr. Joseph R. Sizoo praised Bryan's moral life, service to others, and great faith. Then, in a late-afternoon rain-drenched service on July 31, 1925, Bryan was buried atop a tree-covered hill in Area 4 of Arlington National Cemetery (Bryan had served as a colonel in the Spanish-American War and requested that he be buried at Arlington). He rests with his wife Mary atop a hill in Grave 3121 beneath the tiny inscription, "He Kept the Faith,"

an epitaph that personified the populist, faith-based message of Bryan's life.

D. John Raulston

Judge Raulston, a conservative part-time lay-minister, used the Scopes trial as part of his campaign for re-election the following year, but he lost. He then worked as an attorney in South Pittsburg, Tennessee, during which he often gave speeches for anti-evolution groups. These speeches covered familiar ground, and were often laced with outbursts such as "Take your doctrine that teaches that my ancestors were monkeys and apes, and stick it in that hot place the Scripture tells us of." Later, Raulston described Bryan as the "most outstanding" man at the trial, and Darrow as "a very pathetic man" because Darrow had "no hope for a future life." Raulston, a former school-teacher, died on July 11, 1956, and was buried in Cumberland View Cemetery in Marion County, Tennessee. Raulston's nephew, Judge Jack Raulston, played Judge John Raulston in the trial's reenactment at the 2003 Scopes Trial Play and Festival.

E. George Rappleyea

After the trial, Rappleyea - the trial's primary instigator and stage manager - returned to his work at the Cumberland Coal and Iron Company just outside Dayton. Some in Dayton blamed Rappleyea, a native of New York, for Bryan's death. Soon after declaring he was "as lonely as the ark of truth on Mt. Sinai" and the only "modernist" left in Dayton, Rappleyea left for a job the boating industry in Mobile, Alabama. In January of 1937, Rappleyea went to New York and helped form the American Boat Builders and Repairers, and later that year staged a widely-publicized mock-battle over Long Island Sound between 19 planes and 10 powerboats. In the late 1930s, Rappleyea - then an officer of Higgins Boat Industries in New Orleans - helped charter the United States Power Squadron, and developed equipment to help build landing-strips on beach sand for Marines. After loudly protesting a contract awarded by the U.S. Navy to the British, Rappleyea became a vice president of the American Power Boating Association.

In September of 1944, the *New York Times* reported that Rappleyea had patented an improvement in aerial mapping cameras, and in 1946 in New York Rappleyea marketed "marine plasticized bonded wood." Rappleyea then became treasurer of Marsalis Construction Company in New Orleans. There, on March 2, 1947, Rappleyea was arrested by Federal Alcohol Tax Unit agents for conspiring to violate the National Firearms Act. On March

31, 1948, Rappleyea, William Marsalis (president of Marsalis Construction), and Anthony St. Phillip (a former employee of Marsalis Construction) pleaded guilty in Federal Court in Biloxi, Mississippi, to conspiracy to ship arms and ammunition to British Honduras, and on April 24, 1948 began serving a one year and one day sentence in the Federal Correction Institution at Texarkana, Texas.

After being released from prison, Rappleyea moved to Southport, North Carolina and resumed his work as a chemical engineer. The September, 1951 issue of *Popular Mechanics* reported that Rappleyea had developed a way to build houses out of molasses (for only $1,000 per house), and in 1955 Rappleyea patented Plasmofalt, an asphalt-molasses stucco-like material used as a stabilizing agent in construction projects involving adobe. In the following years, Rappleyea secured several more patents, including one for dehydrating molasses (registered on March 1, 1955) and two others involving bitumen compositions and emulsions (registered February 5, 1957). Rappleyea spent his final years in Miami, Florida, where he served as Director of the Tropical Agricultural Research Lab. He died on August 29, 1966 and was buried in Arlington National Cemetery.

V. The Ongoing Story...

Today, Dayton is a small (population ~6,200), charming, Southern town, and the Rhea County Courthouse that hosted the Scopes Trial is a National Historic Site. Every July, the Dayton Chamber of Commerce hosts the Scopes Trial Play and Festival, which includes a reenactment of the trial in the courtroom in which Scopes' famous trial took place.

Although the Scopes Trial accomplished nothing from a legal perspective, the issues debated at Dayton continue to intrigue the American public. These issues are profoundly American and human - for example, who controls the public schools? How is science related to religion and morality? What is the role of religion in public life? How are the wishes of the majority balanced by the rights of the minority? For the past 80 years, these questions have led people ranging from U. S. Supreme Court Justices and Hollywood celebrities to anonymous citizens to tiny Dayton, Tennessee, where they look to the Scopes Trial for answers.

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12. The McKenzies at Law: Personal Recollections

The Hon. James McKenzie

I. Ben McKenzie at the Scopes Trial

As the retired Attorney General for the 18th Judicial District, Ben McKenzie joined the prosecution team for the Scopes Trial, along with Chief Prosecutor Tom Stewart, William Jennings Bryan, Herbert and Sue Hicks, and William J. Bryan, Jr., and Ben's son J. Gordon McKenzie. Ben was referred to as "General" from his 9 years as the Attorney General. A colorful figure, Ben McKenzie's comments during trial often elicited laughter from those in attendance.

II. Ben McKenzie's Life

Ben McKenzie was born in 1866 to Jeremiah McKenzie who served in both the Mexican-American War and the American Civil War. Jeremiah's father, Benjamin Franklin McKenzie settled in Meigs County Tennessee on 160 acres granted to him by the Cherokee Nation. Growing up in Meigs County, Ben McKenzie attended a common free school and joined both the debate and oratorical societies.

After completing his education in Meigs County, he became a teacher in his home county. At this time Ben began studying law in Decatur. On September 27, 1886, Ben McKenzie passed his bar exam. A year later Ben moved his family to Dayton and tried cases first in Old Washington and later in Dayton.

Ben would tell this story about his early practice in Dayton: "When I was a young man, a little girl about eight years old came to my office. There were not shoes on her feet, and there was snow on the ground. She told me she could not see her father in jail. First I bought her a pair of shoes, but I would have done it if I had had to sell my breeches, and then we went to the jail. She kissed her father, time after time, through the iron bars. The jailer told her after a little while that she had to go. The little girl said to her father, 'I'm sorry, I can't stay with you any longer, but I have got you a present.' She fumbled around under a faded old shawl her aunt had provided her, as her mother was dead. She pulled out an old Goods box full of walnut kernels she had meticulously picked out. I turned around, as I could not witness her farewell. I cried three days over it. Then I went to the Judge and ask what the bond was. Two Hundred Fifty Dollars, I was told and I said I would make it, and I got him out of jail. Later, I freed her father and returned him to the

little girl. No fee was expected, but often the little girl with her father brought me fresh vegetables from their garden, and they were the sweetest vegetables I ever tasted."

In March of 1901 Ben McKenzie argued and won Dayton Coal and Iron Company, Ltd. vs. T.A. Barton in front of the U.S. Supreme Court on behalf of T.A. Barton, an employee of the Dayton Coal & Iron Company, regarding payment for labor with scrips instead of money. Ben's experience with the U.S. Supreme Court and Chief Justice Oliver Wendell Holmes left such an impression upon him that when returning to Dayton, Ben renamed his youngest child Oliver Wendell McKenzie.

In January of 1915 McKenzie was appointed the first Attorney General of the newly formed 18th District on Tennessee. He served this post for the next nine years.

After the Scopes Trial Ben McKenzie kept up a lively correspondence with Clarence Darrow. Before leaving Dayton, Darrow spent time at McKenzie's home and even at one point offered to take McKenzie's son Gordon to Chicago with him to practice law in Darrow's office. McKenzie turned the offer down.

After the Scopes Trial Ben McKenzie continued to practice law in Dayton until his death from a heart attack on June 27, 1938.

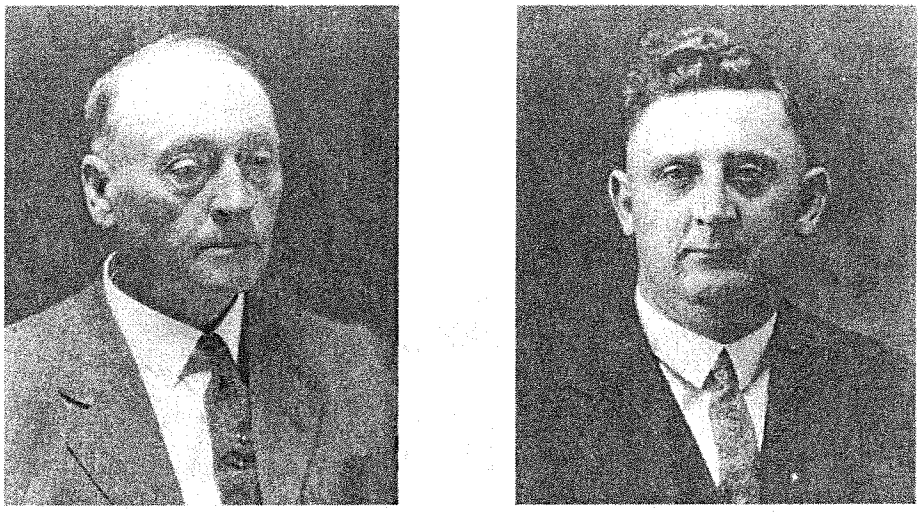

Figure 1. Ben McKenzie (left) and his son Gordon (right).

Figure 2. Ben McKenzie (left) with Clarence Darrow (right) at the trial.

Figure 3. Gordon McKenzie (standing in white suit) addresses the court.

13. Legal Challenges to Evolution in Post-Scopes America

David L. Llewellyn

I. Scientific Inquiry, Academic Freedom and Public Education

Evolution in public education has been the subject of numerous laws and lawsuits in America since the notorious Scopes trial in 1925. The issues raised by these laws and cases (1) began with Christian objections that evolution should not be taught in public schools because it denies the explanation of divine creation presented in the Bible; then developed into contentions (2) that academic freedom requires scientific evidence for creation to receive equal treatment with the theory of evolution in science education; later (3) that science courses and textbooks should contain disclaimers informing students that evolution is only a theory and not a proven scientific fact; or (4) that evolution is an expression of a theory of materialistic naturalism that excludes the existence of a Creator God and therefore, since atheism is a recognized form of religion under the First Amendment, teaching evolution in the public schools as the true, scientific explanation for the origin of the world and life represents unconstitutional establishment of an atheistic religion. These arguments have been considered by various courts, state and federal, including two decisions by the United States Supreme Court, and all of these arguments have been rejected as constitutionally defective on the grounds that they represent direct or disguised attempts to promote a religious doctrine of "creationism" to replace the established and accepted scientific theory of evolution.

II. Laws Banning the Teaching of Evolution

In 1925 the Tennessee Legislature enacted the Tennessee Anti-Evolution Act which provided that in all public and tax-funded schools in the state: "[I]t shall be unlawful for any teacher . . . to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals." The Scopes trial that first brought evolution to the attention of the courts is notorious, legally speaking, because it provoked a cultural event more than a lawsuit. John Scopes was convicted of teaching evolution in violation of the law and fined $100. The fine later was rescinded and the prosecution dismissed on procedural grounds, but the Tennessee Supreme Court in 1927 upheld the statute against constitutional challenges, including claims that the law mandated establishment of religion.

The state of Arkansas enacted a similar law in 1928 that banned textbooks and teachers from teaching human evolution in public and publicly financed schools and other state institutions but made no reference to the Bible or creation. The penalty for violation of the law was a $500 fine and dismissal from public employment as a teacher. The Arkansas statute remained unchallenged - apparently because it was unenforced - until 1965 when (reversing the roles in the Scopes case) a high school biology teacher filed a lawsuit against the state to assert a right to teach evolution. The Arkansas trial court declared the law unconstitutional on the grounds that it violated academic freedom, freedom of thought and freedom of speech. In 1968, in *Epperson v. Arkansas*, the United States Supreme Court declared the Arkansas statute unconstitutional on the grounds that it constituted an establishment of religion and that courts have a duty "to safeguard the fundamental values of freedom of speech and inquiry and of belief."

The religious purpose for the Arkansas statute is not contained in the text of the law, which, unlike the Tennessee statute in Scopes, makes no reference to the Bible or religion, and the Court offers no legislative history of the statute to show religious sponsorship or motivation; rather, the opinion deduces the religious values of the Arkansas law from the cultural era and events of the Scopes trial. "The statute was a product of the upsurge of 'fundamentalist' religious fervor of the twenties. The Arkansas statute was an adaption of the famous Tennessee 'monkey law' which that State adopted in 1925."

The historical impact of the *Scopes* trial and the U.S. Supreme Court decision in *Epperson* (which reads more like a reversal of the *Scopes* case than a review of the Arkansas statute) preclude any possibility of resolving the conflict between creation and evolution by means of enactment of a statute, ordinance or school board resolution banning the teaching of evolution.

III. Laws Mandating the Teaching of Both Evolution and Creation

In 1973 Tennessee enacted legislation (1) to require public school textbooks containing any discussion of origins of life or the creation of man to state that this content was "theory" and was "not represented to be scientific fact" and (2) to require all textbooks presenting the topics of the origins of life or humanity to give equal time, space and prominence to the Biblical account of creation. Noting the special statutory preference given to the Bible, the federal courts, applying *Epperson*, declared the Tennessee equal time statute to be an unconstitutional establishment of religion. The appellate court perceived the state law as a virtual revival of the *Scopes* case, finding no material difference between the 1925 statute banning the teaching of evolution and the 1973 law requiring equal time for

evolution and creation.

In 1981 Arkansas adopted a statute titled the "Balanced Treatment for Creation-Science and Evolution-Science Act," resulting in a lawsuit filed in U.S. District Court challenging the law on the grounds that "creation-science" is religion, not science, and that the statute was a poorly camouflaged subterfuge to reintroduce religious doctrine into the science classroom. In *McLean v. Arkansas Board of Education* the federal Court ruled the statute unconstitutional as an establishment of religion. After review of the religious beliefs, statements and associations of the proponents of the law, the Court concluded that adoption of the statute was motivated by religion, and after consideration of the scientific claims of the supporters of the law and the expert testimony of its opponents, the Court concluded that "balanced treatment" of conflicting scientific evidence of origins as required by the law was impossible, because "'creation science' ... is simply not science."

Two elements of the McLean decision are now widely disputed. First, the *McLean* Court adopted a five-part definition of science. "[T]he essential characteristics of science are: (1) It is guided by natural law; (2) It has to be explanatory by reference to natural law; (3) It is testable against the empirical world; (4) Its conclusions are tentative, i.e., are not necessarily the final word; and (5) It is falsifiable." Applying this definition, the Court ruled that "Creation science ... fails to meet these essential characteristics." This critical definition of science since has been repudiated by the science establishment and abandoned by its principal author. Various critics have observed that if this definition were correct, then evolution would not be science because, *inter alia*, evolution is not testable, not tentative in its conclusions and not falsifiable.

Second, the Court in *McLean* asserted a curious disassociation of evolution from the question of the origin of life as a creation of God: "Although the subject of origins of life is within the province of biology, the scientific community does not consider origins of life a part of evolutionary theory. The theory of evolution assumes the existence of life and is directed to an explanation of how life evolved. Evolution does not presuppose the absence of a creator or God." Here the findings and conclusions conflict. The Court finds (1) that the subject of the origin of life is a scientific question "within the province of biology," (2) that the question of the origin of life is not answered by evolution, (3) that a "creator or God" is not excluded by science or evolution as an explanation of the origin of life, but (4) that a proposed curriculum that would present evidence for God or a creator as the explanation of the origin of life is unconstitutional.

The 1981 Louisiana "Balanced Treatment for Creation-Science and Evolution-Science Act" generated opinions by both the Supreme Court of

Louisiana and the United States Supreme Court. A constitutional challenge was filed in the U.S. District Court, which declared the statute unconstitutional. The Fifth Circuit Court of Appeals certified a question to the Louisiana Supreme Court, asking whether the statute violated the state Constitution. The Louisiana Supreme Court ruled in favor of the statute, holding that it represented lawful legislation establishing a course of study for the public schools under the new Louisiana Constitution. The case then was returned to the federal District Court where the statute again was declared unconstitutional on the grounds of establishment of religion. The District Court opinion on summary judgment held that there were no triable issues of fact and yet proclaimed some far-reaching conclusions. The Court (1) declined to adjudicate the meaning of "science" but (2) did adjudicate the meaning of "religion," finding that "creation" is a religious doctrine because it implies the existence of God, a creator, which is a tenet of many religions. But most notably, still without thinking that the issue deserved a trial, the Court ruled (3) that evolution can never be eliminated from the public school curriculum because all objections to evolution are always and only religious: "The state may not constitutionally prohibit the teaching of evolution in the public schools, for there can be no non-religious reason for such a prohibition." The Court added, "We also do not deny that the underpinnings of creationism may be supported by scientific evidence" but held that historically creation has been promoted in opposition to evolution by religious interests and that the adoption of the Louisiana statute served the purpose of promoting religion.

The United States Supreme Court reviewed the Louisiana "Balanced Treatment" statute cases and issued a narrow ruling but a remarkably long and diverse array of opinions. *Edwards v. Aguillard*, which still represents the highest judicial expression on the issue of evolution in public education, held that the "Balanced Treatment" law was enacted for religious purposes and therefore represented an establishment of religion, because, under the then-prevailing First Amendment principles for analyzing religious establishment, the first requirement of any law or act of government is that it must have a "secular purpose." The secular purpose asserted by the proponents of the law was the advancement of academic freedom. The Court rejected academic freedom as the proffered purpose for the "Balanced Treatment" Act but in doing so held that within an appropriate legal and pedagogical structure teaching scientific critiques of evolution and alternatives to evolution could be justified constitutionally on the grounds of academic freedom. *Edwards v. Aguillard* closes the classroom door on religious teaching in the science curriculum of the public schools, but it opens the constitutional door to scientific evidence critiquing evolution or offering alternative scientific understandings of origins.

IV. Laws Mandating Disclaimers in Textbooks or Science Courses

In 1994 the Tangipahoa Parish Board of Education in Louisiana adopted a resolution requiring that teachers read aloud to their students a "disclaimer" statement immediately before any course of study that included the theory of evolution, to avoid the appearance of official school endorsement of evolution. The disclaimer stated that the "Scientific Theory of Evolution" is being presented "to inform students of the scientific concept" and not "to influence or dissuade [them from] the Biblical version of Creation," that students have a "right and privilege" to "form [their] own opinion[s] or maintain beliefs taught by parents" concerning "the origin of life and matter," and that students should "exercise critical thinking and gather all information possible and closely examine each alternative" on the topic.

The District Court declared the disclaimer unconstitutional on the grounds that it violated the establishment clause of the First Amendment. The Court of Appeals affirmed. After accepting that two of the school board's purposes in adopting the disclaimer were constitutionally valid, "to disclaim any orthodoxy of belief" in evolution "that could be inferred from the exclusive placement of evolution in the curriculum" and "to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution," the Court found that the disclaimer nevertheless violated the establishment clause because "the primary effect of the disclaimer is to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation." The Court noted that the "Biblical version of Creation" was "the only alternative theory explicitly referenced in the disclaimer."

Disclaimers are not unconstitutional per se the Court ruled in a subsequent *en banc* opinion in the Fifth Circuit Court of Appeals, finding only that the Tangipahoa disclaimer was "not sufficiently neutral." The Court, unhelpfully, failed to offer an explanation of what would make a disclaimer sufficiently neutral to satisfy the establishment clause, thus leaving the issue of evolution disclaimers to the contentious, expensive, time-consuming and enervating trial-and-error process of adopting disclaimers and testing them for years in courts before either arriving at a constitutionally proper form or ultimately being told that no evolution disclaimer will ever be deemed acceptable. The Court did, however, provide some minimally helpful guidance, stating that public schools may lawfully tell students (1) that evolution is not the only accepted or acceptable explanation of origins, (2) that students may maintain religious theories of origins, and (3) that outside resources concerning origins also deserve attention.

In 2002 the Cobb County School District in Georgia revised its school board policy concerning teaching evolution and origins to require a disclaimer in the

form of a sticker to be placed in science textbooks stating, "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered." In a federal lawsuit challenging the Cobb County textbook disclaimer, the District Court ruled that although the disclaimer was adopted for valid secular purposes, including "to show consideration for their constituents' personal beliefs regarding the origin of life while still maintaining a posture of neutrality towards religion," the effect of the disclaimer stickers was "endorsement of religion," because religious beliefs of people opposed to evolution were given special attention by the public schools.

Given the reliance of the court's upon religious defects to invalidate disclaimers, a disclaimer based upon scientific critiques of evolution would seem to be legally defensible. The model is Alabama. Since 1995 the state of Alabama has placed science-based disclaimer language in the textbooks used in the state's public schools, a form of disclaimer which has not been challenged in court. The 2001 version of the disclaimer states:

> The word "theory" has many meanings. Theories are defined as systematically organized knowledge, abstract reasoning, a speculative idea or plan, or a systematic statement of principles. Scientific theories are based on both observations of the natural world and assumptions about the natural world. They are always subject to change in view of new and confirmed observations.
>
> Many scientific theories have been developed over time. The value of scientific work is not only the development of theories but also what is learned from the development process. The Alabama Course of Study: Science includes many theories and studies of scientists' work. The work of Copernicus, Newton, and Einstein, to name a few, has provided a basis of our knowledge of the world today.
>
> The theory of evolution by natural selection is a controversial theory that is included in this textbook. It is controversial because it states that natural selection provides the basis for the modern scientific explanation for the diversity of living things. Since natural selection has been observed to play a role in influencing small changes in a population, it is assumed that it produces large changes, even though this has not been directly observed. Because of its importance and implication, students should understand the nature of evolutionary theories. They should learn to make distinctions between the multiple meanings of evolution, to distinguish between observations and assumptions used to draw conclusions, and to wrestle with the unanswered questions and unresolved problems still faced by

evolutionary theory.

There are many unanswered questions about the origin of life. With the explosion of new scientific knowledge in biochemical and molecular biology and exciting new fossil discoveries, Alabama students may be among those who use their understanding and skills to contribute to knowledge and to answer many unanswered questions. Instructional materials associated with controversy should be approached with an open mind, studied carefully, and critically considered.

14. Development of Creationism after Scopes

Kurt P. Wise

I. Introduction

So many centuries now after the enlightenment, there are many who are mystified by creationism in the headlines. It was, after all, before the enlightenment that creationism was the dominant world view in the West. It was afterwards that so many biblical claims were one by one challenged and supplanted by the advances of science. By 1850, a 4004 B.C. creation date had been rejected and by 1870 – just 11 years after the publication of Darwin's *Origin of Species* – evolution had been accepted (and creation rejected). By all counts, the closing gavel of the Scopes Trial should have hammered the last nail into the creationist coffin. So why was the Scopes Trial only the first of many such trials and why does the conflict persist three quarters of a century later?

II. Creationism Defined

Although for many people the words 'creation' or 'creationism' evokes images of a close-minded religious fundamentalist who believes every word of the Bible, and that the earth is flat and the center of the universe, and that species have never changed since the creation, this may describe no modern creationist at all. I wish to focus only on what most consider the most extreme form of creationism – what is variously called young-life or young-earth or young-age or young-universe creationism, and which I will call young-age creationism. Young-age creationism not only accepts the direct interventionary creation of the God of the Bible , but also claims the creation occurred only thousands of years ago.

To place this definition into perspective, it was young-age creationism which was the dominant western world view towards the end of the eighteenth century. By the publication of *Origin of Species*, however, the youth of creation was not accepted in academic circles. Although special creation was still accepted, it was not in a young-age creationist sense, but in an old-age creationist sense, thus displacing the dominant belief down Figure 1 one position to the left. In less than a dozen years later, it was difficult to find a scientist who was opposed to evolution – at least the evolution of animals. Thus although belief in a Christian God was still dominant, the dominant belief was moved further down Figure 1 to that of theistic evolution (with the exception of perhaps the special creation of humans). This more or less describes the situation up to the Scopes Trial, when

the most well-known creationist at the Trial, William Jennings Bryan, not only did not subscribe to a young earth, but he also seemed to be comfortable with the evolution of all organisms except humans.

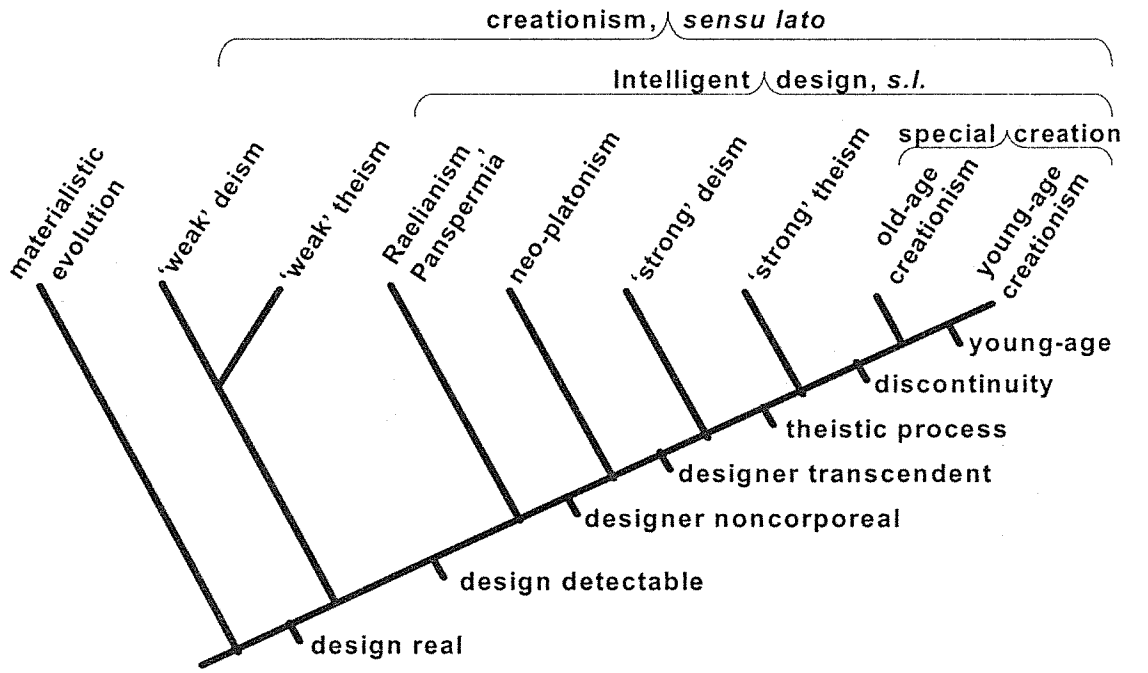

Figure 1: Classification of Origins Positions (adapted from Ross, 2005). From left to right, each successive position holds more and more claims in common with positions to the right. Young-age creationism, the focus of this paper, is the most restrictive origins position in this classification.

III. Lay Versus Professional

Non-creationist historians stress the demise and the young-age creationist historians argue for the continuity of young-age creationism in the nineteenth century. A close examination of the claims in each case suggests the reason for the different interpretations. The non-creationist historians are careful to focus only on publications of the professional scientific community. Non-academics, or academics not considered 'scientists' are ignored. Gillespie's history, for example, did not include any of the nineteenth century 'scriptural geologists' (most of whom were young-age creationists) because none of them contained the credentials and position which would define them as scientific professionals. In contrast, the creationist histories like Nelson and Morris review the works of the scriptural geologists.

Given young-age creationism dominated academia in the eighteenth century, how did it get blotted out of academia by the nineteenth century? The universal answer given by historians – both creationist and non-creationist – is geology, the science of the earth. Geological discoveries – of rock layers, of fossil sequences – all representing time, lots of time, shattered young age creationism. What complicates this story, however, is that geology didn't really exist much before the eighteenth century. Professional training in geology was scant before the nineteenth century. In fact, few in the early years of the Geological Society would have had any formal training in geology either. It was the membership of the Geological Society itself which defined the new field and set the standards of scholarship, education, and excellence. At the same time, this brand new society was actively struggling to prove their worthiness as a valid science before the esteemed members of the Royal Society. So as not to compromise their esteem in the eyes of others, the founders of the Geological Society were reticent to allow young-age creationists among their number. This means that most young-age creationist geologists were denied professional status – they were laymen by definition. And, with the Geological Society editing the only professional journal and defining all educational job descriptions, young-age creationists could neither publish professionally nor achieve academic status. Young-age creationism never lost the academic debate; it was simply excluded.

IV. The Growth of Young-Age Creationism

Since young-age creationism did not have a professional face in the nineteenth century, study of young-age creationism must focus on its non-professional face. This author chose to examine the non-professional nature of young-age creationism by examining the frequency of lay publications through time (Figure 2). To identify the pattern of professional versus non-professional creationism, Figure 2 also includes frequency curves for those books which were authored by those with graduate degrees.

At least three important observations about the history of creationism previous to the Scopes Trial can be deduced from the frequency of creationist works through time. First, young-age creationism persisted through the nineteenth century in a non-professional sense. Second, the continuous, non-zero nature of the frequency of young-age creationist publications shows a continuity between nineteenth and twentieth century young-age creationism. There is thus no need to explain the resurrection of young-age creationism after the Scopes Trial from its nineteenth century extinction, as it was never extinct. Third, given the exponential increase in publication frequency in the twentieth century, the pre-Scopes Trial portion of the curve is actually part of the lag phase of the exponential curve. It is thus a natural period of gradual buildup leading to its explosion in the twentieth century.

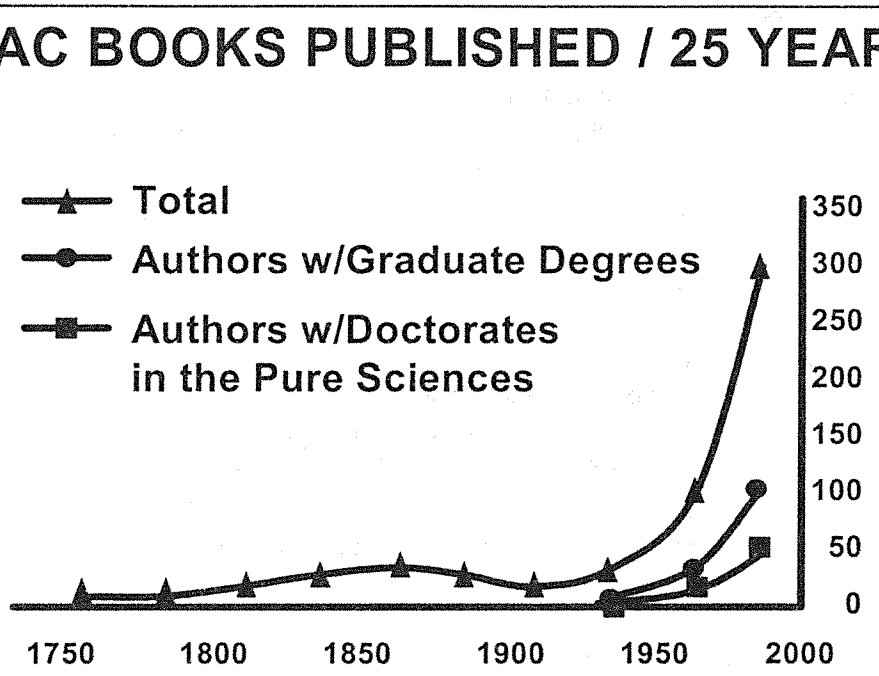

Figure 2: Creationist Publications 1750-2000.

From Figure 2 three observations can be deduced about the history of creationism following the Scopes Trial. First, the most obvious feature of Figure 2 is the steep rise in publication frequency during the twentieth century. This not only suggests that young-age creationism is on the rise, but that it has been on the rise for the last two centuries. Rather than being enigmatic, the popularity of young-age creationism in the twentieth century should have been expected. Second, publications by young-age creationists with advanced degrees appear only after the Scopes Trial. This seems like a perfectly natural increase in sophistication with an increase in population size. It took a century or so for the frequency of young-age creationists in the lay population to rise to high enough levels for students to finally successfully pursue professional degrees in the non-creationist-dominated academia. Third and perhaps most significantly, young-age creation seems to be increasing in sophistication. Not only is there a succession of curves from authors without degrees to authors with graduate degrees to authors with doctorates, but each of the individual curves appears to increase exponentially.

V. Extrapolations

Extrapolations from known data towards regions lacking data (e.g. the future) are always dubious. Yet, if this paper's analysis is correct, young-age creationism is following a rather logical path of professional development. The observed trends are likely to continue. There is likely to be a continuous supply of young-age creationists entering higher education for some time to come. And, since not all of these students have gone through creationist education, many of them are likely to be immune to anti-creationist education in the universities. This suggests that young-age creationists will likely enter more and more disciplines, and increase in numbers in each of the disciplines where they are already found. It follows that within each of the disciplines, as the number of young-age creationists increases, there will be a corresponding increase in the number of professional societies, professional conferences, and peer-reviewed professional journals. As all these phenomena increase, the number of creationist contributions in the conventional literature will likely also increase.

One implication of this whole trend is that as young-age creation academia develops, the animosity of the enterprise is also likely to decrease. The more academic young-age creationism becomes, the less interested it seems to be in legal matters. None of the truly professional societies in young-age creationism have encouraged or entertained legal activity. Rather than place creationism into the schools by legal means, academics are more likely to provide curricula and teaching resources for teachers. As the academic community improves in quality, the curricular materials should increase in quality as well, making it less likely to force the teaching of creation by legal means.

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Participant Biographies

Richard M. Cornelius is the Bryan/Scopes Liaison and Archivist at Bryan College, a Professor Emeritus of English, and the Chairman of the Scopes Trial Museum Committee. In addition to writing, editing, and designing some 30 articles, books, recordings, and exhibits about the Scopes Trial or W. J. Bryan, he has served as a consultant to numerous television programs, historical museums, and writers working on Bryan/Scopes projects. He holds a B.A. from Bryan College and an M.A. and a Ph.D. in English from the University of Tennessee, Knoxville.

Joseph W. Francis is Associate Professor of Biological Sciences at The Master's College in Santa Clarita, CA. He has published many technical articles in microbiology. After earning a Ph.D. in microbiology from Wayne State University, he served as a post-doctoral fellow and research scientist at the University of Michigan Medical School, and he taught at Cedarville University.

Ralph T. Green is a retired administrator and counselor from Chattanooga State Technical Community College and has taught history in Tennessee and Alabama public schools. A Rhea County native, he is a member of the Board of Directors of the Rhea County Historical and Genealogical Society. He holds a B.A. in history from Bryan College and an M.S. in education from the University of Tennessee, Knoxville.

Kenneth E. Hendrickson, III is an Associate Professor of History at Sam Houston State University. A published scholar in British history, he has co-authored with Glenn Stanford a forthcoming book entitled *The Darwin Controversy*. He holds a B.A. and an M.A. from Texas A&M University and a Ph.D. in history from the University of Iowa.

Gale Johnson is the author and director of *Monkey in the Middle: The Scopes Evolution Trial*, a documentary play based 95% word for word on the Scopes Trial transcript with some dramatic bridges to allow for the condensation of the eight-day trial into two hours. This play was written for the annual Scopes Trial Festival, held at the Rhea County Courthouse the third weekend in July every year since 1988. The version performed for this symposium is one hour long. Ms. Johnson holds a B.F.A. in Acting and Directing from the University of North Carolina at Greensboro and an M. A. in Special Education from Appalachian State University.

William L. Ketchersid is a Professor of History at Bryan College and a native of Rhea County. As a specialist in the era leading up to the Scopes Trial, he has recently published *The Gilded Age Presidency Reconsidered.* He holds a B.A. from Tennessee Wesleyan College, an M.A. from the University of Tennessee, Knoxville, and a Ph.D. in history from the University of Georgia.

Edward J. Larson holds the Herman E. Talmadge Chair of Law and is the Richard B. Russell Professor of American History at the University of Georgia. In addition to publishing *Summer for the Gods: The Scopes Trial and America's Continuing Debate Over Science and Religion*, which was awarded the 1998 Pulitzer Prize in history, he has authored over 65 books and articles, including such publications as *Trial and Error: The American Controversy Over Creation and Evolution, Evolution: A History of the Theory, Evolution's Workshop: God and Science on the Galapagos Islands, The Scopes Trial: A Photographic History* (with Edward Caudill). He received his B.A. from Williams College, a J.D. from Harvard Law School, and a Ph.D. in the History of Science from the University of Wisconsin.

David L. Llewellyn, Jr. is a practicing attorney in California, and has been a Dean and a Professor of Law at Trinity Law School, an adjunct professor at Pepperdine School of Law, and an Assistant Professor of English at Bryan College. His legal publications, over 300 syndicated newspaper columns, and participation in numerous panels and forums reflect his interests in civil rights, religious liberty, public policy, and international human rights. He received a B.A. from Bryan College, an M.A. from the University of Tennessee at Knoxville, and a J.D. from UCLA.

James W. McKenzie is the first Rhea County Family Court Judge and has jurisdiction in the areas of Domestic Relations, Juvenile Court, General Sessions, and Civil and Criminal cases. His paternal grandfather, Benjamin G. McKenzie, was the first Attorney General in the 18th Judicial District and participated in the Scopes Trial, and his uncle, J. Gordon McKenzie, was a Rhea County judge and a member of the prosecution in the Scopes Trial. Judge James McKenzie has played the role of his grandfather, B. G. McKenzie, in the annual dramatic reenactment of the trial during the Scopes Trial Festival. He holds a J.D. from Cumberland School of Law at Sanford University.

Randy Moore is a Professor of Biology at the University of Minnesota. He has been the editor of *The American Biology Teacher* and is on the editorial board for the *Journal of College Science Teaching* and *the Journal of Biological Education.* The National Association of Biology Teachers published his book *In the Light of Evolution: Science Education on Trial*, and *The American Biology Teacher* journal published a series of 13 articles on the creation/evolution issue that Dr. Moore wrote. He holds a Ph.D. in biology from U.C.L.A.

Tom Morgan is a native of Rhea County and a professional musician who specializes in traditional country music. He plays, builds, and repairs several kinds of instruments. In addition, he has a broad performing acquaintance with a great many musicians. Since several of his ancestors interacted with some of the Scopes Trial notables, Tom collects and performs Scopes Trial songs and arranges for the music at the Scopes Trial Festival. His associate, **Lynne Haas**, has a musical background of glee clubs and church choirs and provides an enriched dimension for their performances at schools and civic groups.

Ronald L. Numbers is the Hillsdale and William Coleman Professor of the History of Science and Medicine and Chairman of the Department of the History of Medicine at the University of Wisconsin. He is a founding member of the International Society for Science and Religion. His many publications include *Darwinism Comes to America, The Creationists: The Evolution of Scientific Creationism,* and the monumental *Creationism in Twentieth-Century America: A Ten-Volume Anthology of Documents.* He holds a Ph.D. in the History of Science from the University of California at Berkeley.

Carl A. Pierce is the W. Allen Separk Distinguished Professor of Law at the University of Tennessee College of Law, where he has been teaching American legal history since 1972, including in recent years a course that focuses on the Scopes trial. He received his B.A. and J.D. degrees from Yale University and is licensed to practice law in Tennessee.

Lawrence H. Puckett is Circuit Court Judge for the 10th Judicial District of Tennessee (Bradley, McMinn, Monroe, and Polk Counties). His interest in the Scopes Trial has been developed by his associations with Bryan College: first as a student, then a graduate, a president of the Alumni Association, and a trustee. He received the J.D. degree from the University of Memphis.

Glenn M. Sanford is an Assistant Professor of Philosophy at Sam Houston State University, where he has directed the honors program and taught courses in the Philosophy of Biology and the Philosophy of Science. He received his Ph.D. in philosophy from Duke University. The title of his dissertation was "Explaining Evolution: Genes, Culture, Environment, and Mechanisms."

Harold Ray Stevens is a Professor Emeritus of English at McDaniel College, a past president of the H. L. Mencken Society, and a trustee and founding member of the Joseph Conrad Society. In addition to publishing essays on Mencken, he has published numerous essays and some books on the Bible, Lord Byron, E. M. Forster, John Galsworthy, Eugene O'Neill, and Virginia Woolf. He received his Ph.D. in English from the University of Pennsylvania.

Kurt P. Wise is an Associate Professor of Science and Director of the Center for Origins Research at Bryan College. In addition to his teaching on campus, a busy schedule of speaking engagements off campus, and publishing articles, videos, and books, he spends a significant amount of time in the field doing scientific research at such locales as Death Valley, caves, and dinosaur sites. At Harvard, where he earned his M.A. in geology and his Ph.D. in invertebrate paleontology, he studied under Stephen Jay Gould.

Todd Charles Wood is an Assistant Professor of Science at the Center for Origins Research at Bryan College. He conducts research in computational and comparative genomics and has published his findings in *Science*, *Genome Research*, and *Plant Molecular Biology*. He received his Ph.D. in biochemistry from the University of Virginia.

Please see page 62 for explanation of this addendum.

JUDGE RAULSTON'S AGENDA AND ITS IMPACT ON THE SCOPE'S TRIAL:

AN INQUIRY INTO WHAT WENT WRONG AND WHY?

By Lawrence H. Puckett
September 28, 2006

The verdict of Judge Raulston's[1] peers on the Tennessee Supreme Court was clear. The Scopes trial was a judicial failure. The majority of that court saw "nothing to be gained by prolonging the life of this bizarre case." Other causes the trial may have advanced or hindered notwithstanding, as an exercise of the state's judicial power the trial was not successful. In the high court's view "the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be better conserved by the entry of a nolle prosequi," a dismissal of the case by the Attorney General of the State.[2]

Somehow, Judge Raulston's optimistic plans[3] for the trial had gone badly awry. The big legal issues were overwhelmed by the conclusive collision between the legendary personas on each side, William Jennings Bryan and Clarence Darrow. If Judge Raulston had thought the trial would be a nifty stage upon which to launch

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[1]John Tate Raulston was born 22 September 1869 to William Doran and Comfort Matildia Tate Raulston, in the remote farming community of Fiery Gizzard Cove, in Marion County Tennessee. After his father died, he helped his mother and six siblings run the family farm. Young Raulston taught school to save enough to attend Grant University (now the University of Tennessee at Chattanooga). He was admitted to the Chattanooga Bar in 1896 and after twenty two years in practice was elected Circuit Judge of a seven county district (Eighteenth Judicial District) in 1918. Deeply religious he served as lay preacher in his church. He died in Winchester, Tennessee, July 11, 1956.

"Locally. . . Raulston's reputation was that of a kindly, fair and decent man. . ." L. Sprague de Camp, The Great Monkey Trial (Garden City, New York: Doubleday & Company, Inc., 1968), 83-4.

[2] Scopes v. State, 154 Tenn. 105,121, 289 S.W. 363, 367 (1925) (C.J. Green's majority opinion).

[3]Raulston had "grandiose expectations for the trial" which "lost touch with reality." He explained to some reporters "my suggestion is that a roof be built over a large vacant lot and seats be built in tiers. . ." to "seat twenty thousand people." Edward J. Larson, Summer for the Gods, (Cambridge: Harvard University Press, 1997), 109.

successful re-election campaign, as Darrow later charged, he was proved mistaken.[4] He failed to win re-election in 1926.

His plan for a trial that, as Raulston forecast, would satisfy "intellectual interest" and "give both sides ample time to present their cases"[5] failed also. Because expert witnesses on behalf of Scopes were disallowed by the judge, the testimony of the scientific experts in support of the facts of evolution and against fundamentalist views of the Bible's creation account were submitted by affidavits prepared by the defense lawyers and, therefore, went forth from the trial via the press without the state's attorneys being allowed to cross-examine the witnesses or to offer rebuttal testimony by experts of their own.[6] Adding to the lopsided nature of the witness presentation in favor of the arguments in defense of Scopes' teaching of evolution from Hunter's Civic Biology textbook was the judge's ill-advised decision to let the attorneys call one another as witnesses which, when he abruptly aborted Darrow's examination of Bryan, left exposed to examination the weaknesses of only one side's premises. In this trial, instead of the dangerous social theories of Darwinian evolution contained in the public school textbook Scopes used being examined and exposed as Bryan sought to do, [7] the Bible became the subject of trial examination. The defense strenuously

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[4]Darrow responding to Judge Raulston's post trial criticism said "Judge Raulston was elected on a fluke and is now campaigning for re-election this fall. The trial was part of his campaign." Ray Ginger, Six Days or Forever? (Boston: Beacon Press, 1958), 196.

[5]Larson, 109, quoting Judge Raulston.

[6]The World's Most Famous Court Trial (Dayton: Rhea County Historical Society, 1978 reprinted 1990 by Bryan College), 217-280 (hereafter cited simply as Trial).

[7] In argument against the court's admission of scientific testimony, Bryan cited Hunter's text book, A Civic Biology, page 194, showing the court a diagram which placed man alongside

objected to Darwin's The Descent of Man being offered into evidence unless they were allowed to call expert witnesses to explain evolution and the book was never placed in evidence.[8] As historian Henry Steele Commager observed, "encouraged by the court, the press, and public opinion," Bryan and Darrow evaded the constitutional issue, and religious fundamentalism (in the person of William Jennings Bryan) was put on trial.[9] Once the trial took this turn, even Judge Raulston would seek for a way to extricate himself from it. He certainly never intended that his conduct of the trial would cause it to turn out the way it did - a trial of his own religious beliefs and the religious beliefs of millions of other Americans.

EXACTION

Judge Raulston may fairly be held accountable for the trial and any negative consequences flowing from the trial, as the trial had come to Judge Raulston's court in part through his own efforts. Attorney Frank L. Carden of Chattanooga accused the judge of unethically chasing down the case by reconvening a grand jury to indict Scopes so as to forestall any other case testing the Butler Act[10] from reaching court first.[11] Ray Ginger claims Judge Raulston colluded with town officials to extend the trial by holding more brief court sessions so that the crowds of "extra customers" would

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thirty-four hundred and ninety-nine other mammals. Trial, 174-75 . He also read the court portions of The Descent of Man. Ibid., 176-77.

[8] Trial., 176.

[9]Henry Steele Commager, The American Mind (New Haven: Yale University Press, 1961),182-3.

[10]Public Acts of Tennessee, Chapter No: 27, p.50 (1925).

[11]Ray Ginger, Six Days or Forever? (Boston: Beacon Press, 1958), 147.

linger longer in Dayton.[12] An eye witness to the trial, W.C. Curtis, noted that "in the courtroom it was evident that Judge John T. Raulston enjoyed himself tremendously as the commanding figure in a trial that was attracting worldwide attention."[13]

All that changed after Darrow's examination of Bryan. Sheriff R. B. Harris, in private consultation with the judge, warned him that the local feeling against Darrow aroused by his treatment of Bryan on the stand created an atmosphere threatening riot and violence. The Sheriff advised, "This thing must be stopped" or "someone is likely to get hurt."[14] Although Judge Raulston earlier gave public indication that he wanted to hear the testimony of the scientific experts and had planned for it,[15] he yielded to pressure from state leaders who, according to Edward J. Larson, were fearful "that such testimony would heap further ridicule on Tennessee and its law."[16] No wonder the high court felt that the peace and dignity of the state had not been conserved by the trial.

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[12]Ibid., 73. Ginger, relies on a news report from The United Press.

[13] D-Days at Dayton, Jerry R. Tompkins ed. (Baton Rouge: Louisiana State University Press, 1965), 77. As recalled by W.C. Curtis a scientist invited to testify for the defense at the trial.

[14]Louis W. Koenig, Bryan (New York: Capricorn Books, 1975), 653.

[15]Judge Raulston had announced to the world upon setting the trial for July 10, 1925, that "I have set a date when all universities and schools will be through their terms of school in order that scientists, theologians and other school men will be able to act as expert witnesses." Larson, 109.

[16]Larson, 180-1. Mencken left the trial and Dayton before the showdown between Darrow and Bryan. His last report gives an inkling of the ridicule the state's judicial system suffered from the trial. "The Scope's trial, from the start, has ben carried on in a manner exactly fitted to the anti-evolution law and the simian imbecility under it. There hasn't been the slightest pretense to decorum. The rustic judge, a candidate for re-election, has postured before the yokels like a clown in a ten-cent side show, and almost every word he has uttered has been an undisguised appeal to their prejudices and superstitions." D-Days at Dayton, 50.

That there was a trial at all was offense enough for some. To them the trial was an ugly exercise. The enforcement of a statute which the Governor who signed it into law viewed merely as a "protest against the irreligious tendency to exalt so-called science" and "not. . . sufficiently definite to admit of any application or enforcement."[17] When the Act passed, Governor Austin Peay told the legislature, "Nobody believes that it is going to be an active statute."[18] Bryan himself had not wanted the Act to contain any penalty for its violation and he so advised the Tennessee Legislature.[19] Nevertheless, the bill passed as its sponsor John Washington Butler had written it, including its provision for "upon conviction" a fine of "not less than One Hundred ($100.00) Dollars nor more than Five Hundred ($500.00) Dollars for each offense."[20]

The case exacted its price from all its participants. Eventually both teams of litigants would be offended, those for Scopes because he was tried and convicted as a criminal misdemeanant (the reversal of his conviction rankled them even more) and those for Bryan because of his humiliation by Darrow. The Baltimore American newspaper reported that after Bryan's testimony " It was pretty generally agreed that

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[17]Ginger, 7; Trial., 213-14.

[18]Ginger, 7; Stephen V. Ash, Messages of the Governors of Tennessee 1921-1933 (Nashville: The Tennessee Historical Commission, 1990), Vol. 10, 174 (Peay's Special Message of March 23, 1925).

[19]Ibid., 6. Ginger and Larson each cite Bryan's February 9, 1925 letter to Tennessee State Senator John A. Shelton in which Bryan recommended Tennessee follow Florida's example and pass a statute passed there the previous year which did not carry a penalty for violations. Ginger says Bryan thought this was "wise for two reasons: A penalty could be used as a diversion by enemies of the bill, as had been done in defeating an anti-evolution bill in Kentucky. Also the law was to apply to an educated class who presumably would obey the law." Also see Larson, 54.

[20]Ginger, 3 and 6.

Bryan's answers to Darrow's questions did neither the prosecutor nor Bryan any good" and that "the opinion among some was that Darrow had finished Bryan as a leader of any movement for all time."[21]

The judge's decision to let Darrow examine Bryan helped lift the trial into legend. It caused a furor on both sides of the issue, the disappointment and pain of Bryan supporters and the jubilation and triumphalism of Darrow's. Accordingly, the decision of Judge Raulston to allow the examination of Bryan is probably what cost him re-election, and the trial merits a close look with a view to determine how this decision came to pass.

DIRECTION

Judge Raulston began the trial well.[22] After introduction of visiting counsel, the court obviated the alleged defect in the indictment by convening a new grand jury which

[21]Wednesday, July 22, 1925, p.1. The article continues '"Bryan was born on a cross of gold and died on a cross-examination' was a comment that was passed about the courtroom today." There is no doubt that Bryan departed the witness stand possessed of less dignity than when he took it. Such is the nature of hostile witness examination in an American courtroom. It is to be expected that one who has important testimony to give may be handled roughly and Bryan's lofty stature only helped highlight the fact of his diminished size in the dock. In our time we have seen two presidents, Ronald Reagan and Bill Clinton, suffer from diminished image after their appearances on the witness stand. Neither of them was treated as disdainfully as Bryan by Darrow. As far as Bryan's performance on the stand goes, respected legal scholar and litigator Alan Dershowitz after reading the trial record recently wrote that "for the most part," Bryan "actually seems to have gotten the better of Clarence Darrow in the argument over the Bible" and "Darrow comes off quite poorly - in fact as something of an irreligious cynic." Alan M. Derschowitz, America on Trial (New York: Warner Books, 2004), 265-6.

[22]One may take exception to whether the trial started in an appropriate manner. H.L. Mencken commented that: "The whole process quickly took on an air of strange unreality, at least to a stranger from heathen parts." D-Days at Dayton, 39. The appropriateness of beginning court with sectarian prayer by a local minister as was Judge Raulston's practice contributed to Mencken calling the result a "religious orgy" and Darrow's complaint to the judge, "I do object to the turning of this courtroom into a meeting house in the trial of this case." Ibid.; Trial., 89.

forthwith returned a new indictment of John Thomas Scopes. Clarence Darrow immediately raised the issue of the scheduling of out-of-town expert witnesses the defense expected to call. He interjected that "I don't know how counsel on the other side feel about it. I think that scientists are competent evidence - - or competent witnesses here, to explain what evolution is, and that they are competent on both sides."[23] In this offhand way Darrow raised the most crucial evidentiary and procedural issue that would confront Judge Raulston in the trial and, as he did, Darrow deftly broached a ground of possible agreement between the state and the defense by expressing the defense's position that experts "are competent on both sides." But the state did not take the bait offered by Darrow.

Attorney General Stewart made the state's opposition clear. After conferencing with Darrow and counsel on both sides Stewart addressed the court:

> If the court please, in this case, Mr. Darrow stated, the defense is going to insist on introducing scientists and Bible students to give their ideas of certain views of this law and that, I am frank to state, will be resisted by the state as vigorously as we know how to resist it.[24]

Stewart advised the court that the defense "are just as earnest" in their insistence that they are entitled to call scientist experts as witnesses to testify "as to what the theory of evolution is or interpret the Bible."[25] For his part, Judge Raulston wisely and probably as a matter of routine practice directed the attorneys, once the jury were selected to

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[23] Trial., 8.

[24] Ibid.

[25] Ibid., 8-9.

> outline your theories in an opening statement and in that way the court can have some ideas as to what the issues are going to be, and, of course, after the issues are made up and the evidence is offered, then the court will promptly rule as to the competency of any evidence that is offered.[26]

A favorable ruling by the court on the defense request to allow expert witnesses was the key to their defense. Commenting on the importance of this trial court exchange, Ray Ginger in his book "Six Days or Forever?," the first full treatment analyzing the trial, observed that,

> Thus, in the first full session of the trial, the major issue was defined. Could the defense seek to prove that the theory of evolution was valid and that it did not necessarily conflict with the Bible? Or would the issues be limited to the factual question of whether Scopes had violated the Butler Act? On the resolution of this issue would depend the nature of the trial. If the issue was narrowly limited by the court, the defense had no case to offer.[27]

Darrow viewed the expert testimony as crucial and felt the defense prospects for a favorable ruling on this were much better in Federal Court than State Court: "Unless we land in the Federal Courts," Darrow said before the trial, "the whole matter of evolution, pro and con, may be ruled out in Dayton. In other words, the case might resolve itself into the simple question of whether or not Scopes taught evolution in his classes."[28]

Bryan also understood the importance of the judge's ruling on the expert witness issue. Although later developments seem to contradict the fact, William Jennings Bryan

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[26] Ibid. 8.

[27] Ginger, 96.

[28] Ibid. 83

initially set out to keep the trial strictly confined to legal issues. In a letter to W.B. Marr, June 11, 1925, Bryan wrote "If, we can shut out the expert testimony, which is intended to prevent the enforcement of the law by proving that it ought not to have been passed - - a perfectly absurd proposition - - we will be through in a short time."[29]

If the trial was to move in the direction the defense desired it to move, the judge would have to be willing to hear the defense experts on the theory of evolution and on the Bible before ruling on the constitutionality of the Butler Act. Therefore, when they launched their attack on the Butler Act by motion to quash the indictment on grounds resting on provisions of the State Constitution and the Fourteenth Amendment of the U.S. Constitution, the defense asked the court to reserve its ruling on the constitutional issues. As Attorney John Randolph Neal advised the court, "Now, may it please your honor, we would prefer to have you reserve judgment, if the state will permit and the argument in connection with this question until the whole case [is heard]." Neal advised the court that "the evidence will be of enlightening character both to your honor and the jury."[30] To this request the state's Attorney General, Tom Stewart, quickly and emphatically replied: "We want the matter disposed of at this time, yes, sir."[31]

The court agreed with the state and did not dispense with argument of the constitutional issue, thus prompting the first speeches by attorneys in the case during which Darrow's sur-rebuttal conveyed the first hint of the defense strategy to personalize the case by attacking Bryan and his belief as the source of all the mischief.

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[29] Ibid., 79-80.

[30] Trial., 50.

[31] Ibid.

This stratagem was born of the realities facing the defense. The defense had reason to expect that the court would uphold the Butler Act against their constitutional attacks. The fact that the trial judge would not reserve his ruling on the Act's constitutionality until hearing all the defense experts on evolution-science and the Bible, gave indication that the judge was leaning against the defense on the constitutional issues. Therefore, the defense, albeit hopeful of a favorable ruling, could not have been very surprised when Judge Raulston blocked the defense effort to have the Butler Act declared unconstitutional, ending defense hopes for the best possible outcome for their side - a termination of the trial with a ruling exonerating Scopes and declaring the Butler Act unconstitutional. Having anticipated that the trial might go in this direction, the defense knew it had better have an alternative plan for the trial. They did. And William Jennings Bryan was the key to releasing the defense from the confines imposed by the judge's ruling against them on the constitutional issue.

PROTECTION

The defense strategy to attack Bryan had nothing at all to do with the legal aspects of the case. It was one of the defense's goals through the trial to reach beyond the courtroom to the mind of public opinion.[32] The defense wisely began to focus attention on William Jennings Bryan and make him and his beliefs issues in the case because they knew they must challenge Bryan's stature and his formidable influence with the public by discrediting him in the trial. The fact that Bryan was in the case on the prosecution side all but ensured that the scope of the issues raised would exceed

[32]In addition to international press coverage, WGN Radio in Chicago carried the trial in the first live national broadcast of an American trial.

the reach of the courtroom if the judge did not declare the Act unconstitutional. In this sense, the presence of Bryan was a gift to the defense. "The import of the trial is in the presence of Mr. Bryan," wrote the Chicago Daily Tribune.[33]

First to attack was Darrow, who told the court that Bryan was responsible for the enactment of the Butler Act. Darrow identified Bryan as the one "who is prosecuting this case, and who is responsible for this foolish, mischievous and wicked act."[34] And he quoted Bryan "Now I have seen somewhere a statement of Mr. Bryan's that the fellow that made the pay check had a right to regulate the teachers."[35] Darrow's mild attack on Bryan elicited no pleas of protest or protection from state's counsel table.

After Judge Raulston ruled against their constitutional challenge to the Act, defense attorney Dudley Field Malone's speech which pointed directly at Bryan[36] did not go unchallenged.

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[33]"The Scopes Trial," The Chicago Daily Tribune (July 17, 1925) said of Bryan: "He represents the real seriousness, not of the act itself but of the pressure behind the act, of the motive and intent in the rear. Mr. Bryan and the people who support him and give him power intend that their opinions shall get into the law of the country." But according to historian Paul Johnson, "Bryan spoke for some of the best, and most essential, elements in American society," which John Dewey identified in a 1922 article in the New Republic as "the churchgoing classes, those who have come under the influence of evangelical Christianity . . . [and who] form the backbone of philanthropic social interest, of social reform through political action, of pacifism, of popular education . . . believing in education and better opportunities for its own children . . ." Paul Johnson, A History of the American People (New York: Harper Collins Publishers, 1997), 671-2 quoting Dewey's article praising middle America in the New Republic, May 10, 1922. Also see note, 80, infra, Arthur Garfield Hays acknowledging that the defense did not want to alienate "millions of intelligent" churchgoers whom they sought to persuade through the trial.

[34] Trial., 74.

[35]Ibid., 86.

[36]D-Days at Dayton, 47. H.L. Mencken said "The whole speech was addressed to Bryan."

Before looking at Malone's speech to the court and the state's plea to the court for protection of Bryan from the defense attacks on him, it is worth noting that the defense attacks on Bryan's personal beliefs are not consistent with Darrow's request of Judge Raulston that he protect the jury from hearing references to the religious views of the trial participants. The request occurred the third day of trial in the context of court wrangling over the prayers with which Judge Raulston opened court each day.

During the disputation of the prayer matters, Darrow was the object of an unfavorable comment by General Stewart. For several mornings running, the defense had objected to the prayer. General Stewart, expressing exasperation to his continual objections, referred to Darrow as an "agnostic" and he used the word "infidelity" to describe Darrow's beliefs.

The encounter begins with Darrow's objection to the prayer:

> Mr. Darrow - I do not object to the jury or anyone else praying in secret or in private, but I do object to the turning of this courtroom into a meeting house in the trial of this case. You [the court] have no right to do it.
>
> The Court - You have a right to put your exceptions in the record.
>
> Gen. Stewart - In order that the record may show the state's position, the state makes no contention, as stated by counsel for the defense that this [case] is a conflict between science and religion insofar as the merits are concerned, it is a case involving the fact as to whether or not a school-teacher has taught a doctrine prohibited by statute and we, for the state, think it is quite proper to open court with prayer if the court sees fit to do it, and such an idea extended by the agnostic counsel for the defense is foreign to the thoughts and ideas of the people who do not know anything about infidelity and care less.[37]

[37]Trial., 89-90.

Arthur Garfield Hays and Dudley Field Malone immediately excepted "to the statement 'agnostic counsel for the defense,'" as a reference to Mr. Darrow's "right to believe or not believe." The next day, Attorney Neal sought to obtain an apology from General Stewart for the remark, but Stewart refused saying, "When I do a thing that I feel badly about, I apologize. So long as I speak what I conceive to be the truth, I apologize to no man."[38] Darrow finally ended the episode by acknowledging in open court

> I don't want the court to think I take any exceptions to Mr. Stewart's statement . . . he is perfectly justified in saying that I am an agnostic, for I am. And I do not consider it an insult, but rather a compliment to be called an agnostic. I do not pretend to know where many ignorant men are sure; that is all agnosticism means. He did, however, use the word 'infidel,'. . . Of course, the word 'infidel' has no meaning whatever. Everybody is an infidel that does not believe in the prevailing religion. . .[39]

He summed up the matter and proffered: "I do not think that anybody's religious creed should be used for the purpose of prejudicing or influencing any action in this case." Darrow said "that is all I shall insist on through this case," and he continued:

> The fact that I am an agnostic ought not to weigh in the balance as to whether Mr. Scopes is innocent or guilty. And all I ask for is that if counsel thinks it is wise to refer again to it that it shall not be done in such a way in the presence of the jury as to in any manner influence anybody, and I think I am right on that. . . [40]

Judge Raulston responded:

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[38] Ibid., 97.

[39] Ibid., 99.

[40] Ibid.

> I think Colonel Darrow is correct when he suggests no reference be made to the religious belief of any counsel in the presence of the jury; that it might prejudice the jury in the trial, and I shall expect that no such references will be made during the trial of this case.[41]

Undeterred by this ruling, the jury was present in court to hear Malone argue:

> While the defense thinks there is a conflict between evolution and the Old Testament, we believe there is no conflict between evolution and Christianity. There may be a conflict between evolution and the peculiar ideas of Christianity, which are held by Mr. Bryan as the evangelical leader of the prosecution, but we deny that the evangelical leader of the prosecution is an authorized spokesman for the Christians of the United States. The defense maintains that there is a clear distinction between God, the Church, the Bible, Christianity and Mr. Bryan. . . (Here Mr. Malone referred to Mr. Bryan's introduction to Jefferson's "Statute of Religious Freedom")[42] [And he read from Bryan's writings.][43]

which Malone said revealed a Bryan of a more liberal belief in his younger years. As he put it:

> These words were written by William Jennings Bryan and the defense appeals from the fundamentalist, Bryan of today, to the modernist, Bryan of yesterday.[44]

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[41] Ibid.

[42] "The Statute of Virginia for Religious Freedom" was drafted by Thomas Jefferson and shepherded through the Virginia Legislature by his friend, James Madison, where it became law in 1785. Thomas Jefferson was so proud of this Statute that he had included on his grave marker "Here was buried Thomas Jefferson, Author of the Declaration of American Independence, of the Statute of Virginia for Religious Freedom and Father of the University of Virginia." David McCulloch, John Adams (New York: Simon and Schuster, 2001), 649 also W.B. Swaney, Safeguards of Liberty (New York: Oxford University Press, 1920), 146.

[43] Trial., 113-14.

[44] Trial.,115. As Malone pointed out, Bryan had written concerning Thomas Jefferson's preamble to the statute for religious freedom, "Tell me that Jefferson lacked reverence for religion. He rather lacks reverence who believes that religion is unable to defend herself in a contest with error. He places a low estimate upon the strength of religion who thinks that the wisdom of God must be supplemented by the force of man's puny arm. . . Jefferson put first that . . . the

Malone denied that the defense had the purpose to destroy Christianity. Again William Jennings Bryan was cast by Malone as the source of the false charge against the defense as Malone explained to the court and jury:

> The defense denies that it is part of any movement or conspiracy on the part of scientists to destroy the authority of Christianity or the Bible. The defense denies that any such conspiracy exists except in the mind and purposes of the evangelical leader of the prosecution.[45]

He explained that "the narrow purpose of the defense is to establish the innocence of the defendant Scopes" but "the broad purpose of the defense will be to prove that the Bible is a work of religious aspiration and rules of conduct which must be kept in the field of theology " and ". . . that science and religion embrace two separate and distinct fields of thought and learning."[46]

Malone's argument brought an objection from General Stewart who interrupted Malone with "Your honor, I except to that part of the statement that has brought in Mr. Bryan's name. . . and that you strike his name out."

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regulation of the opinions of men on religious questions by law is contrary to the laws of God and to the plans of God. . . if God himself was not willing to use coercion to force man to accept certain religious views, man, uninspired and liable to error, ought not to use the means that Jehovah would not employ. Jefferson realized that our religion is a religion of love and not a religion of force." Trial., 114-15.

[45] Ibid., 116.

[46] Ibid.

The court ruled in the General's favor commenting, "I hardly think that Col. Bryan's name should be injected into your statement, Col. Malone. I will just exclude it - - eliminate it."[47]

But, of course, the radio audience was listening and the newspapermen and the public were there with the jury to hear all this against Bryan. Mr. Malone parried the judge's ruling:

> I suppose this court at any rate, will take judicial notice of the fact that Mr. Bryan is a most important member of this prosecution, in the court's mind, and in my mind.
> I suppose the court will take judicial notice of the fact that Col. Bryan is a recognized leader of his day and Col. Bryan's name is used in this connection in the same way that any other great leader's name would be used in that connection. . . I maintain that I have a right to use Mr. Bryan's name as representative of the views conflicting with our own.[48]

But Judge Raulston did not agree.

> The Court - I do not think Mr. Bryan's personal views are involved in this case, so I think it is not proper in connection with this statement to mention him, and sustain the motion to eliminate his name.[49]

Undaunted by the judge's ruling, Malone continued reading his prepared argument reiterating the charge that Bryan had changed his former modernist views and become fundamentalist. He identified Bryan as "a member of the prosecution in this case, whom I have described as the evangelical spokesman of the prosecution, and we of the defense appeal from his fundamentalist views of today to his philosophical views of

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[47] Ibid., 117.

[48] Ibid.

[49] Ibid.

yesterday, when," Malone repeated the charge that Bryan "was a modernist to our point of view."[50] Again General Stewart rose in objection, "Your honor, I want to interpose an objection again. He is treading upon the soil your honor directed him not to tread upon."

> The Court - Yes, Col. Malone, I would like that you not make further reference to Col. Bryan. Let that be excluded.[51]

Then Malone who had known Bryan for years interjected an all important point. "Yes, your honor, I do not think Mr. Bryan is the least sensitive about it." Which led to the following exchange of Bryan with Judge Raulston and Malone:

> Mr. Bryan - Not a bit.
> The Court - It is not a question of whether it gives offense,
> it is a question of your legal rights.
> Mr. Malone - I believe I am acting in my legal rights and if your honor excludes that, I will take an exception.
> Mr. Bryan - The court can do as it pleases in carrying out its rules; but I ask no protection from the court, and when the proper time comes, I shall be able to show the gentlemen that I stand today just where I did, but that this has nothing to do with the case at bar.[52]

Bryan's response played well in the gallery. There was loud applause in the court room.[53] But it did not play well at his own counsel table. Bryan appeared to nonchalantly throw aside the state's strategy of avoiding a dispute over religion and to

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[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Ibid.

embrace defense counsel's strategy. Bryan's life-long principle of never running from public scrutiny, which served him well politically, in the trial would cost him dearly. It cost Tom Stewart too! Bryan defied the lead counsel later when he subjected himself to Darrow's examination. General Stewart objected and continued to object "at least a dozen times"[54] during Darrow's questions of Bryan, trying to stop it.

Judge Raulston showed he was prepared to protect Bryan and preserve the trial's legal purposes. At this stage of the trial, Bryan made clear that unless Judge Raulston protected Bryan from Bryan, he would not be protected. Bryan would never voluntarily refuse defense attempts to expose his views to public scrutiny in the trial. Of course Bryan had reason to believe that the Judge would protect the process and that he would be given the chance in a similarly dramatic fashion in the same forum to expose Clarence Darrow and Darwinian evolution as propounded in Hunter's Civic Biology.[55] Bryan cannot be faulted for believing that certainly the judge would see to that. In which case, Bryan was confident that the truth would protect him.

The title of the textbook used by Scopes, A Civic Biology, indicates its intent and content to be more than mere teaching of the "facts" of science. The text espoused the application of scientific evolution to the civil affairs of man. Hunter's text included a passage in which Hunter ranked five major races of man into a theory of racial

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[54]Larson, 190. General Stewart could not have been more plain or more correct on the law of evidence in stating his numerous objections. An example: "This has gone beyond the pale of a lawsuit, your Honor. I have a public duty to perform under my oath, and I ask the court to stop it. Mr. Darrow is making an effort to insult the gentleman on the witness stand, and I ask that it be stopped, for it has gone beyond the pale of a lawsuit." Sheldon Norman Grebstein, Monkey Trial (Boston: Houghton Mifflin Company, 1960), 152. Trial., 288.

[55]George William Hunter, A Civic Bilogy (New York: American Book Company, 1914).

superiority. He placed the "Ethiopian or Negro type, originating in Africa" at the bottom and "the highest type of all, the Caucasians, represented by the civilized white inhabitants of Europe and America" at the top. The "Maylay or brown race," "the American Indian," and "the Mongolian or yellow race, including the natives of China, Japan and the Eskimos" in between.[56] In another passage titled "Parasitism and its Cost to Society," Hunter claimed certain families to be bearers of hereditary weaknesses such as the sexually immoral, confirmed drunkards, epileptics and the feeble minded. In the next section titled "The Remedy," he wrote "If such people were lower animals, we would probably kill them off to prevent them from spreading."[57] Such biological determinism and the application of the facts of evolution to civil affairs, Bryan

[56]Bryan would not have tried to convince the all white male jury that the American Negro was their equal. In the 1924 Democratic Convention, in order to avoid a split in the party between Northern and Southern Democrats, Bryan favored a resolution that "reaffirmed the Democratic Party's devotion to the fundamental constitutional principles of freedom of religion, speech, press, and assembly" but which avoided naming and censuring the Ku Klux Klan. Koenig, 620-2.

[57]Hunter, 196 and 262-63. These two passages in Hunter's text book prompted Stephen Jay Gould, a leading evolution scientist of our day, to conclude that "Bryan advocated the wrong solution, but he identified a serious problem!" Stephen Jay Gould, Rocks of Ages (New York: The Library of Contemporary Thought, The Ballantine Publishing Group, 1999), 167-9. In Bryan's proposed address prepared for publication after the trial he quotes Darwin's, The Descent of Man, "No one who has attended to the breeding of domestic animals will doubt that" man's "allowing weak members of civilized society [to] propagate their kind . . . must be highly injurious to the race of man . . . but, excepting in the case of man himself, hardly anyone is so ignorant as to allow his worst animals to breed." Trial., 335. Charles Darwin, The Descent of Man (New York: D. Appleton and Company, 1872), Vol I, 162.

opposed on religious and moral grounds. He planned to point these out to the court in the summation he prepared for the court but was never allowed to give.[58]

Bryan summed up the case:

> Let us, then, hear the conclusion of the whole matter. Science is a magnificent material force, but it is not a teacher of morals. It can perfect machinery, but it adds no moral restraints to protect society from the misuse of the machine. It can also build gigantic intellectual ships, but it constructs no moral rudders for the control of storm tossed human vessels. It not only fails to supply the spiritual element needed but some of its unproven hypotheses rob the ship of its compass and thus endangers its cargo.[59]

Darrow on the stand would have been challenged by Bryan to account for his application of scientific evolution in the realm of human civil affairs in the Leopold and Loeb case. Bryan took exception to Darrow's "philosophy based on evolution" used by Darrow in the Loeb trial. As Bryan points out, in the Loeb trial, Darrow professed biological determinism for the purpose of absolving his client from the responsibility to pay for his crime with his life. Bryan recounts Darrow's argument:

> Mr. Darrow said: "I say to you seriously that the parents of Dickey Loeb are more responsible than he, and yet few boys had better parents". . . Again, he says, "I know that one of two things happened to this boy; that this terrible crime was inherent in his organism, and came from some ancestor, or that it came through his education and training after he was born."
> But let me complete Mr. Darrow's philosophy based on evolution. He says: "I do not know what remote ancestor may have sent down the seed that corrupted him, and I do not know through how many ancestors it may have passed

[58]By avoiding closing summation, Darrow and the defense planned to deprive Bryan of an opportunity to recover himself and undo the negative press from Darrow's examination. Koenig, 653.

[59]Trial., 338. "Bryan's Proposed Address in the Scopes Trial."

> until it reached Dickey Loeb. All I know is, it is true, and there is not a biologist in the world who will not say I am right."[60]

Such statements by Darrow provided Bryan fertile ground for a potential examination of Darrow on the witness stand. Bryan would have then dramatically shown the world "this dogma of darkness and death" and exposed to the light the evolutionist's belief "that back in the twilight of life a beast, name and nature unknown, planted a murderous seed and that the impulse that originated in that seed throbs forever in the blood of the brute's descendants, inspiring killings innumerable, for which the murderers are not responsible because coerced by a fate fixed by the laws of heredity!"[61]

Few today or then would disagree with Bryan's conclusion that such a philosophy "is an insult to reason and shocks the heart," and "is as deadly as leprosy." Nor would they fail to take exception to Darrow's use of such an argument as Bryan did when he said "it may aid a lawyer in a criminal case, but it would, if generally adopted, destroy all sense of responsibility and menace the morals of the world."[62]

The important point is that Bryan's willingness to be a witness was driven, in no small part, by his zeal to unmask Darrow and his particular brand of social Darwinism as part of a larger effort to discredit the theory of evolution altogether. Bryan in his letter to W.B. Marr before the trial began "thought it good that 'an outspoken believer in evolution' like Darrow was to conduct the defense since 'he will furnish us with

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[60] Trial., 332.

[61] Ibid., 333.

[62] Ibid.

abundant material.'"[63] He relished the chance to put Darrow on the stand to answer his questions just as Darrow surely salivated at the thought of Bryan on the stand forced to answer his. But before this prospect arose, Bryan, at this early stage, showed himself unwilling to resist defense efforts to draw him and his personal beliefs into the trial. Bryan was just as willing to talk about his beliefs as Darrow had been to talk about his agnosticism but neither had anything to do with the legal issues confronting the court.

LIMITATION

When Bryan chose to speak on the legal issues, he acquitted himself well. First of all, he noted a reality about the trial which no one else involved seemed to recognize at the time. The efficacy of the trial had its limitations. "No my friends, no court or the law, and no jury, great or small, is going to destroy the issue between the believer and the unbeliever."[64] He continued, "No, we are not going to settle that question here [between the divine creation of man and evolution], and I think we ought to confine ourselves to the law and to the evidence that can be admitted in accordance with the law."[65] He went further and exposed the defense strategy to turn the trial into a public relations effort on behalf of the theory of evolution, rather than limit the trial to the legal issues. He maintained that

> the facts are simple, the case is plain, and if those gentlemen [the defense] want to enter upon a larger field of educational work on the subject of evolution, let us get

[63]Bryan to W.B. Marr, June 11,1925; Ginger, 79.

[64] Ibid., 181

[65]Ibid., 182.

> through with this case and then convene a mock court for it will deserve the title mock court if its purpose is to banish from the hearts of the people the Word of God as revealed.[66]

Bryan argued that limitations must be placed upon what children are taught because the thing pupils are taught in the classroom matters; it affects their behavior. On this point, Bryan quoted Darrow's argument from the Leopold and Loeb murder trial where Darrow had successfully saved the lives of the two murderers by arguing to the sentencing judge that their conduct was influenced by the two youths' exposure to the philosophical writings of Frederick Nietzsche. [67]

As to the State's right to limit what is taught in its schools, Bryan pointed out that the Tennessee Constitution did not permit the Bible to be taught in the state's public schools.[68] But the question before the court, said Bryan:

> The question is can a minority in this state come in and compel a teacher to teach that the Bible is not true and make the parents of these children pay the expenses of the teacher to tell their children what these people believe is false and dangerous? Has it come to a time when the minority can take charge of a state like Tennessee and compel the majority to pay their teachers while they take religion out of the heart of the children of the parents who pay the teachers?[69]

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[66]Ibid.

[67]Ibid., 179-80.

[68]Tenn. Const. Art. I, Sec. 3, The Religious Preference Clause of the Tennessee Constitution provides "that no preference shall ever be given by law to any religious establishment or mode of worship."

[69]Trial., 172.

Bryan's argument against using taxpayer money to support teachers of irreligion originates from the struggle for religious liberty in America which took place in the State of Virginia shortly after the close of the American War for Independence. In 1785, a proposal before the Virginia Legislature sought to fund Anglican Ministers as teachers of religion in the Commonwealth. James Madison wrote his famous "Memorial and Remonstrance"[70] against the measure, which was defeated. The debate over the issue led to passage of Jefferson's Statute of Virginia for Religious Freedom. The defense in Scopes argued academic freedom and Bryan's argument against state support of the teaching of evolution was the counter to it. If the Christian belief could not be preferred and the Bible could not be taught as the result of a constitutional limitation, so be it, but the people had a similar right to say that irreligion should not be preferred and taught and to limit the use of their taxes to pay for it. To hold otherwise would be to offend the individual conscience of the Tennessee taxpayer in no less degree than the charging of a tax on Virginia dissenters to support Anglican teachers offended Madison and Jefferson in 1785. To quote the "Act for Establishing Religious Freedom" so dear to both Jefferson and Madison, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." [71]

[70]For an interesting record of the struggle for Religious Freedom in Virginia see Robert B. Semple, History of the Rise and Progress of the Baptists in Virginia, rev'd and extended by Rev. C.W. Beale (Richmond: Pitt and Dickinson, 1894) Madison's "Memorial and Remonstrance" is found at page 501.

[71]Recent Establishment Clause Jurisprudence has forbidden a legislative attempt to protect the religious views of parents and students who believe in intelligent design and/or creationism. Judge John E. Jones. III U.S. District Judge Middle District of Pennsylvania, case No: 04

A majority of the Tennessee Supreme Court agreed with Bryan's argument ruling that "since the State may prescribe the character and the hours of labor of the employees on its works, just as freely may it say. . . what shall be taught in schools"[72] by them. The ultimate success of the state's case before the Tennessee Supreme Court thus turned upon three of the four Justices' agreement with Bryan's argument that the state could limit what was taught in its public schools to the extent that, as

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CV2688, Kitzmiller v. Dover Board of Education in his December 20, 2005 Memorandum Opinion found impermissible the School Board's disclaimer announcing to science class pupils that "with respect to any theory, students are encouraged to keep an open mind" and that "the school leaves the discussion of the Origins of Life to individual students and their families." Saying this "disclaimer's plain language" conveyed a "strong message of religious endorsement" to the student, the trial judge chided the Board for its use of the disclaimer to "protect a religious view," presumably of the child and parent as well as the majority of the School Board "from what the Board considers to be a threat." Memorandum Opinion p.44. Quoting the case of Freiler v. Tangipahoa Board of Education, 975 F. Supp. 819 (E.D. LA 1997) aff'd. 185 F. 3d 337 (5th Cir.1999), Judge Jones stated that:

> By directing students to their families to learn about the "Origins of Life," the paragraph [of the disclaimer referenced here] performs the exact same function as did the Freiler disclaimer. It "reminds school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life," thereby stifling the critical thinking that the class's study of evolutionary theory might otherwise prompt, to protect a religious view from what the board considers to be a threat. Id. [Freiler] at 345 (because disclaimer effectively told students "that evolution as taught in the classroom need not affect what they already know" it sent a message that was "contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and willingness to alter and shift existing viewpoints"). Memorandum Opinion, p. 44.

[72]Scopes v. State, 154 Tenn. at 115, 289 S.W. at 366. Chief Justice Grafton Green, who wrote the Majority Opinion quoted here, was joined by Justices Cook and Chambliss. Dissenting Justice McKinney found the penal statute unconstitutional "for uncertainty of meaning." Id. 154 Tenn. at 129, 289 S.W. at 370. Justice Swiggart, who came on the Tennessee Supreme Court to fill a vacancy after the oral argument, took no part in the decision.

Darrow put it, “the fellow that made the pay check had a right to regulate the teachers.”[73]

REPUTATION

On the sixth day of the trial, Judge Raulston delivered his ruling excluding expert testimony which both sides understood signaled the near end of the proceedings. Having lost every important issue before Judge Raulston, Clarence Darrow let his contempt for the court and its ruling show to the judge. Reputations were at stake.

The facts surrounding the contempt of court are simple. Darrow engaged in a heated exchange with the court and adversary counsel over the procedure to be followed to make an offer of proof of what the expert witnesses, who had been excluded, would have testified to had they been allowed to take the witness stand. In doing so, he referred to his desire to seek protection for his client from a higher court and he implied that Judge Raulston was prejudiced against the defense. This was bold. But, was it rash or ill considered?

Darrow had once written that “an actor may fumble his lines, but a lawyer needs to be letter-perfect, at least, he has to use his wits [though] . . . he may forget himself and often does.”[74] One wonders whether Darrow had forgot himself or whether he was exercising his wits and the “element of luck and chance,”[75] which Darrow knew was part of every trial, was looming before him at this moment in this case. Darrow had never

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[73]Trial., 86, see text at note 35, supra.

[74]Clarence Darrow, “Attorney for the Defense,” Esquire 1936 reprinted by Arthur and Lila Weinberg, Clarence Darrow: Verdicts out of Court (Chicago: Quadrangle Books, 1963), 314.

[75] Ibid., 315.

before been held in contempt of court.[76] Darrow's contrived scene directed at Judge Raulston is consistent with Darrow's theatrical vision of the courtroom which he compared to "the stage" and "the arena", which, said Darrow, "are alike in that each has its audience thirsting to drink deeply of the passing show." To Darrow, "those playing the parts vie for success and use whatever skill and talent they possess."[77] Whether purposeful or not, Darrow proceeded to put on quite a show.

> Mr. Darrow - What we are interested in, counsel well knows what the judgment and verdict in this case will be. We have a right to present our case to another court and that is all we are after. And they [the state's attorneys] have no right whatever to cross-examine any witness when we are offering simply to show what we expect to prove.
> The Court - Colonel, what is the purpose of cross-examination?
> Mr. Darrow - The purpose of cross - examination is to be used on the trial.
> The Court - Well, isn't it an effort to ascertain the truth?
> Mr. Darrow - No, it is an effort to show prejudice.
> (Laughter)
> Nothing else.
> Has there been any effort to ascertain the truth in this case? Why not bring the jury in and let us prove it?
> [Suggesting the court change its ruling excluding experts]
> The Court - Courts are a mockery -
> Mr. Darrow [Interrupts] - They are often that, your honor.

[76]In his apology, Darrow told the judge that in his forty-seven years of trial practice he had "never yet . . . had any criticism by the court for anything I have done in court." Trial., 225. Darrow answered Judge Raulston's post trial criticism of his trial behavior calling his citation of Darrow for contempt "absurd" but admitting that he "did feel a contempt for" Judge Raulston's "unfairness." He said, "I did show it, as often happens by lawyers in court. I did apologize as I should have done. This constantly happens in court and the Judge knows it although it never happened to me before." de Camp, 454 quoting Darrow's 11 August 1925 wire from Colorado to the Chicago Daily News in response to Judge Raulston's public attack on him after the trial.

[77]Darrow, 314.

> The Court - When they permit cross-examination for the purpose of creating prejudice.[78]

The court then ruled that "if the defense wants to put their proof, in the record in the form of affidavits, of course they can do that. If they put the witness on the stand and the state desires to cross-examine them, I shall expect them to do so."[79] To which Darrow took an exception.

The judge continued with Darrow telling him, "Yes, sir; always expect this court to rule correctly,"[80] to which Darrow retorted "No, sir, we do not." This caused laughter. The clash between Darrow and Judge Raulston reached its climax when Darrow suggested that the defense needed the rest of the day to draft the expert witness affidavits. When the judge did not readily accede to the request, Darrow chided the Judge, "If your honor takes a half day to write an opinion . . . I do not understand why every request of the state and every suggestion of the prosecution should meet with an endless waste of time, and a bare suggestion of anything that is perfectly competent on our part should be immediately over-ruled." To which Judge Raulston replied, "I hope you do not mean to reflect upon the court?" whereupon Darrow sarcastically replied: "Well, your honor has the right to hope." At last, prompting from the court: "I have the

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[78]Trial., 206.

[79]Ibid.

[80]Ibid., 206. Judge Raulston's ruling was correct. Nevertheless, it gave an advantage the defense desired. As Arthur Garfield Hays records this, the defense objection to cross-examination of their experts "was based on rather an interesting reason. . . cross-examination would have shown that the scientists, while religious men - for we chose only that kind - still did not believe in the Virgin birth and other miracles. It was felt by us that if the cause of free education was ever to be won, it would need the support of millions of intelligent churchgoing people who didn't

right to do something else, perhaps,"[81] referring to the court's power to hold Darrow in contempt of court. Judge Raulston possessed the power to punish Darrow's contempt summarily without trial or further proof as in any other case where a contempt against the dignity of the court is committed in the presence of the judge.[82] When the judge did not immediately act, Darrow bluntly challenged Judge Raulston's control of the case. Immediately following Judge Raulston's threat to do more, General Stewart commented to Darrow that "The court has held he has held" and "we are conducting this case as the court directs," to which Darrow replied ominously, "So far." [83]

Based on Darrow's behavior throughout the rest of the trial, one could conclude that Darrow was doing more here than indicating his belief that, on appeal, new rulings would be established in the case. From this point in the trial forward, Darrow got pretty much all he wanted from the trial judge, and on the stand, from opposing counsel William Jennings Bryan. The advice Bryan received before the trial from Samuel Untermeyer went unheeded by Bryan and the court. Unless the issue was "strictly confined" by Bryan and his co-counsels, Untermeyer had warned Bryan "there is so much of a 'grand stand play' involved in this prosecution and so great a desire on the

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question theological miracles." The defense did not want to alienate them. Arthur Garfield Hays, Let Freedom Ring (New York: Boni and Liveright, 1928), 67.

[81]Ibid., 207.

[82]State v. Krichbaum, 152 Tenn. 416, 278 S.W. 54 (Tenn.1925). That Darrow was guilty of contempt of court was obvious to any barrister of the time. There was unanimous agreement among three practicing attorneys interviewed at the time by a Baltimore newspaper that Darrow was in contempt of court. Baltimore American, Tuesday July 21, 1925 p.2. The article "Flays" Darrow for his conduct and praises Judge Raulston for his restraint.

[83]Trial., 207.

part of local influences to convert it into a sensational controversy" that ". . . it will not be easy to keep the trial within the legal limits."[84] In the heat of battle, Bryan did not follow Untermeyer's advice nor the directions of Attorney General Stewart.

[84]Samuel Untermeyer to Bryan, June 25, 1925; Koenig, 637.

When considering Judge Raulston's role in Darrow's examination of Bryan, one notes that the pattern of Darrow's bad behavior the judge allowed during Darrow's contempt of court continued during Darrow's questioning of Bryan. For Darrow's part, his brutish behavior with Bryan may have been calculated by him to cause the judge to preempt his own examination by Bryan and deter Judge Raulston from the judge's announced intention to require Darrow and his colleagues to submit to Bryan's examination. Today no one disputes that it was utter folly for Bryan to agree to take the stand. Is it to be believed that Darrow was willing to follow his lead and commit himself to such a foolish act? It is difficult to believe that Darrow ever intended to let Bryan cross-examine him, and it is plausible that he fully realized that whatever else he accomplished with Bryan's testimony, he must cause the judge to relent on his promise to Bryan that Bryan would be allowed to call Darrow and the other defense attorneys as witnesses. One suspects that to accomplish this ulterior aim, Darrow turned his examination of Bryan into such a brouhaha that it wrecked the trial. When this happened, the judge would have to close it down no matter what he had originally intended or promised. Before ending it,[85] Judge Raulston haplessly found the situation beyond his control when an annoyed Bryan lashed back at Darrow:

> The witness:
> [Bryan] - These gentlemen have not had much chance - they did not come here to try this case. They came here to try revealed religion. I am here to defend it, and they can ask me any question they please.
> The Court - All right.
> (Applause from the court yard).
> Mr. Darrow - Great applause from the bleachers.

[85]Trial., 306. Although the court adjourned with Bryan on the stand Friday, Darrow made it clear to the court on Monday, when the Judge ordered Bryan's testimony stricken from the record, that Darrow had not finished with his examination of Bryan on Friday.

The witness:
[Bryan] - From those whom you call "yokels."
Mr. Darrow - I have never called them yokels.
The witness:
[Bryan] - That is the ignorance of Tennessee, the bigotry.
Mr. Darrow - You mean who are applauding you? (Applause).
The witness:
[Bryan] -Those are the people whom you insult.
Mr. Darrow - You insult every man of science and learning in the world because he does not believe in your fool religion.
The Court - I will not stand for that.
Mr. Darrow - For what he is doing?
The Court - I am talking to both of you.

At which point Tom Stewart objected to Darrow's "effort to insult the gentleman on the witness stand," to which the judge replied;

> To stop it now would not be just to Mr. Bryan. He wants to ask the other gentleman questions along the same line.[86]

This comment by Judge Raulston shows the pinch the judge was feeling at that moment.

The incentive for Darrow to behave badly and provoke a ruckus among the crowd of onlookers was present at the outset of his examination of Bryan. Bryan gave in to Darrow's provocations and brought the crowd along with him.[87] The ensuing uproar

[86]Ibid., 288. Judge Raulston, when issuing his ruling striking Bryan's testimony from the record, explained what had led him into the error of allowing Bryan to testify. The Judge explained "There are two things that may lead a judge into error. One is prejudice and another is over-zeal to be absolutely fair to all parties. I feel I may have committed error on yesterday in my over-zeal...I feel the testimony of Mr. Bryan can shed no light upon any issues that will be pending for the higher court. The lawsuit is whether or not Mr. Scopes taught that man descended from lower animals." Ibid., 305.

[87]The headline the next day read "Near Riot as Bryan and Darrow Clash." Baltimore American, Tuesday, July 21, 1925, p.1. The article says that "Judge Raulston adjourned court to prevent a riot among the court audience" occasioned when Darrow responded '"There isn't an intelligent Christian on earth who believes in your fool ideas'" prompting "two thousand people" who "arose to their feet in a wave of tense anger and religious excitement" on Bryan's behalf as "Bryan turned to the people without stretched arms as he shouted 'He is slurring and slurring and slurring the Bible.'" Ibid.

worked to prevent Bryan from presenting the final points in the trial in an examination of Darrow. Though Judge Raulston did not want to deprive Bryan of the opportunity to question Darrow which he had promised him before Bryan agreed to testify, in order to stop Darrow's mistreatment of Bryan and restore order to the proceedings the judge was forced to stop the examination. Ironically, Darrow benefitted from Bryan's ability to arouse the passions of an audience and his failure to control his own.

For his part, Tom Stewart had had enough. He met that evening with Bryan and the State's team of lawyers and "at Stewart's insistence Bryan's plan to grill Darrow the following day" was nixed by the State's lead counsel.[88] It was rumored that Stewart had threatened to dismiss the State's case against Scopes unless the case was brought back to the status of a lawsuit.[89] As a result Darrow would not have to answer Bryan's questions.

ABDICATION

As already noted, Darrow's lack of restraint before the court continued during his examination of Bryan. By allowing the examination, Judge Raulston abdicated his role as protector of the process. Darrow's abdication was not complete but his attack on Bryan was of no legal benefit to his client. It only served to inflame local sentiment against him.[90] Bryan abdicated his role as attorney when he became a witness. All the

[88] Koenig, 653.

[89] Baltimore American, Wednesday, July 22, 1925, p.2.

[90] Ginger, 174. Ginger quotes George Fort Milton of the Chattanooga News, " one of the outstanding editors in the South" who said of Darrow's examination that it was "a thing of immense cruelty." It was "deeply offensive" to "the very people that the defense had been trying

main characters were outside their appointed places, which prompted Tom Stewart to eventually object to the judge "we have left all annals of procedure behind."[91] Sadly, all three men behaved badly in their new roles, [92] and it became a very personal matter between Bryan and Darrow, which was not at all up to the standard Bryan optimistically expected when he wrote to a friend before the trial that "there is no reason why the Scopes trial should not be conducted on a high plane without the least personal feeling."[93] Both Bryan and Judge Raulston may have thought that the trial was over and

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to win over," observed Ginger. Also see, Don Herzog, "Liberalism Stumbles in Tennessee," 96 Mich. L. Rev. 1898, 1906 (May 1998). Herzog says "putting it crudely . . . liberals [like Darrow] collectively send devout Christians [like Bryan's supporters] two messages : 'you're idiots' and 'you're entitled to toleration.' No wonder that so many Christians conflate the two strands of the liberal tradition and see liberal toleration as a dismissive gesture . . . No wonder too, that issues surrounding evolution, creation science, school prayer, and the like have been so hotly contested. In the ban that keeps creation science and prayer out of the public schools, some see even handed liberal toleration; the ban expresses no view on the merits of creation science and prayer; it says only they don't belong in this social setting. Others see the ban as an official proclamation that secular humanism is better than Christianity." Ibid., 1908. The decision to personally bash Bryan began a tradition in liberal circles which Herzog decries: "unlike racists, for example, whom liberals appropriately assault, Christians offend no principle of liberal politics . . . even those who defend their illiberalism [against gays and feminists] on recognizably Christian grounds supply liberals no good reason for bashing Christianity. Here liberals might learn a lesson from their adversaries and remember to hate the sin but love the sinner." Ibid., 1909.

[91]Grebstein, 165., Trial., 300. Stewart continued "This is a harangue between Col. Darrow and his witness. He makes so many statements that he is forced to defend himself."

[92]Carlyle Marney said of it "The only thing more disgraceful than Mr. Bryan's answers at Dayton was the set of Mr. Darrow's questions." D-Days at Dayton, 135. Judge Raulston reportedly enjoyed the exchanges. Ginger says "Judge Raulston was an eager participant" in the laughter when Bryan answered that there are some things he does not think about and to the question from Darrow: "What do you think?" Bryan answered: "I do not think about things I don't think about." Ginger, 170; Trial., 287. Not leaving it Darrow asked: "Do you think about things you do think about?" Bryan: "Well, sometimes." Ibid., Scopes records "I did not laugh during the Bryan examination, nor did any other of the defense. . . there was nothing amusing in it to us." John T. Scopes and James Presley, Center of the Storm: Memoirs of John T. Scopes (New York: Holt Rinehart and Winston, 1967), 172.

[93]Bryan to Ed Howe, June 30, 1925; Koenig, 637.

offers of proof like that of Bryan's testimony were of little consequence. They unwittingly may have entered into a kind of "mock" trial mentality after the legal issues had been decided. Earlier Bryan had alluded to such a debate about evolution taking place after the trial.[94] But the trial was not over. Only Bryan and the judge failed to appreciate the danger this phase of the trial posed to them. Darrow wanted to take on Bryan[95] and Bryan had welcomed it if it meant he could question Darrow. It is more difficult to determine why the judge allowed it.

Why did Judge Raulston allow Darrow to question Bryan and interject Bryan's personal beliefs into the trial contrary to the judge's prior ruling? Why did he allow testimony about Bryan's beliefs about the Bible when such testimony was clearly legally irrelevant?[96] Several causes have been suggested to explain the change in the judge's attitude about letting the personal views of counsel into the trial. In addition to a simple lapse of attentiveness, it is postulated that the judge yielded to his own grandiose

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[94]See, supra, text at note 66.

[95]Larson, 72-3. Darrow was fully prepared to examine Bryan. In response to William Jennings Bryan's published statements about evolution in 1923, Darrow had made headlines in The Chicago Tribune asking for answers from Bryan to questions like those he posed to Bryan at the trial. Kirtley Mather says Darrow spent part of the weekend rehearsing for his examination of Bryan using Mather in the role of Bryan. de camp, 365, note 12, letter from Mather to de Camp 14 June 1965. Hays either forgot about this or intentionally distorted the facts in his book Let Freedom Ring. He claimed that "I have never yet discovered whether this was a greater surprise to Darrow or to Bryan" when he called Bryan as an expert on the Bible. According to Hays, the examination by Darrow was not planned and there was some debate in the courtroom over who would do the examination. "Darrow turned to Malone: 'You examine him Dudley.' Malone answered, 'Oh, no.' Darrow turned to me, I shook my head." Hays, 71-2.

[96]"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Tenn. Evid. Rule 401 (2005).

impulses to sensationalize the trial and prolong his time in the media's attention or that he may have yielded to the influence of either Bryan or Darrow. Probably all these factors combined to produce the most dramatic moment of the trial when William Jennings Bryan took the witness chair.

The suggestion that Judge Raulston was influenced to rule in Darrow's favor by the fact that he had repeatedly ruled against him until this point in the trial may seem implausible. But Darrow who was a student of human nature may have pushed Raulston to the point of risking a contempt of court for just such a tactical advantage. It is more plausible that he would do so after all other avenues for the defense had been closed off by the judge. Attorneys attack the court and its rulings as part of the vigorous advocacy deemed necessary by the attorney to protect his client.[97]

If not intentional, Darrow's outburst, nevertheless, bore better fruit than one could have imagined at the time it occurred. Ray Ginger believes Darrow's apology to Judge Raulston for his contempt established a new connection between Darrow and the judge. According to Ginger,

> Darrow, by his confessional, forced Judge Raulston to become surrogate of the merciful Christ. "If we confess our sins, He is faithful to forgive us our sins, and to cleanse us from all unrighteousness" (1 John 1:9). The judge stepped easily into the role:

[97] State v. Green, 783 S.W. 2d 548 (Tenn. 1990), is an example in which the attorney's conduct resulted in contempt of court for defense counsel's jerking a chair around in court, accusing the court of being unfair in its evidentiary rulings, unfair by assisting the state in voir dire, and suggesting opposing counsel suffered from mental instability. The Court overturned five findings of contempt because the Supreme Court thought the attorney's actions were motivated by counsel's "sincere pursuit of the vigorous advocacy he deemed necessary under the circumstances to represent a client on trial for his life." 783 S.W. 2d at 553.

> "My friends and Colonel Darrow, the Man that I believe came into the world to save man from sin, the Man that died on the cross that man might be redeemed, taught that it was godly to forgive, and were it not for the forgiving nature of Himself I would fear for man. The Savior died on the cross pleading with God for the men who crucified Him. I believe in that Christ. I believe in these principles. I accept Colonel Darrow's apology.[98]

Ginger's version fails to account for Bryan's willingness to be a witness and Judge Raulston's surprise at it. The judge queried Bryan, "Mr. Bryan, you are not objecting to going on the stand?" To which Bryan quipped, "Not at all."[99]

Instead, Ginger holds Judge Raulston alone accountable for Bryan going on the stand, pointing out that "Judge Raulston could have saved him. But he did not."[100] Ginger's criticism of the judge is unwarranted by the facts. Although Raulston enjoyed the public notice the trial was giving him, from this fact alone Ginger leaps to the conclusion that Judge Raulston either acted in concert with Darrow and the defense to bring it about or so wanted it to happen that he could not restrain himself when the opportunity to decide presented itself. Ginger claims that

> if the judge had not actually connived at the event, he certainly welcomed it. John T. Raulston lusted for head-lines as others lust for harlots or for Heaven, and already, in this brief trial, he had vented his lust in ways more meretricious than this.[101]

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[98]Ginger, 153; Trial., 226.

[99]Trial., 284.

[100]Ginger, 166.

[101] Ibid.

Ginger sees Bryan's insistence on being allowed later to examine Darrow and the defense as insincere and as a delaying gesture. In Ginger's version, Bryan was stalling, delaying, and looking to Raulston for a graceful way out of his predicament, efforts that the judge thwarted when he curtly replied, "Call anybody you desire."[102]

John Scopes does not agree with Ginger. According to Scopes, it was Bryan not Darrow to whom the judge yielded. There was no hint of delay in Bryan according to Scopes.

Scopes records in his memoirs that "Raulston probably would have ruled with Stewart," and kept Bryan off the stand "had Bryan himself not been on his feet, demanding his right to testify."[103] Scopes' version is more credible since he was eye witness to the interaction between the personalities in court. According to his account, when Hays called Bryan as a witness, Tom Stewart "fast on the trigger" objected immediately. "All the lawyers leaped to their feet at once. The Judge blanched and was at a loss for words. Everyone seemed to be talking at once so that the court reporter couldn't possibly have got it all down."[104] At the time, W.C. Curtis, a witness for the defense who was at the trial, thought Judge Raulston's "deference" to Bryan throughout the trial was "obvious."[105]

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[102]Ginger, 166; Trial., 284.

[103]Scopes and Presley, 166.

[104]Ibid; D-Days at Dayton, 27.

[105]D-Days at Dayton, 77. In his article forty years later, Curtis changed his view of Judge Raulston's behavior. "Now. . . as I read the stenographic record of the trial, it seems to me that Judge Raulston was not so partial as we [of the defense] thought. He was acting according to his lights as well as his prejudices. Since it was for him the greatest responsibility of his career to that time, who can blame him for being pleased to have his photograph taken so frequently."

Scopes describes Bryan as "defiant."[106] He provides a motivation for Bryan to testify. He believes Bryan "wanted to be David and kill the giant Goliath, now named Darrow" because Bryan needed to save face after Malone's speech in reply to Bryan on the expert evidence issue earlier out performed Bryan's speech. The crescendo of Malone's speech must have stung Bryan. It was the sort of speech Bryan himself would have wished to make but could not in this case because religion and government in support of religion had invaded the realm of scientific truth in the Butler Act, not the other way around. Bryan found himself on the wrong side of the argument, and Malone therefore, with unlimited confidence, defended the truth of science saying:

> There is never a duel with the truth. The truth always wins and we are not afraid of it. The truth is no coward. The truth does not need the law. The truth does not need the forces of government. The truth does not need Mr. Bryan. The truth is imperishable, eternal and immortal and needs no human agency to support it. We are ready to tell the truth as we understand it and we do not fear all the truth that they can present as facts. We are ready. We are ready. We feel we stand with progress. We feel we stand with science. We feel we stand with intelligence. We feel we stand with fundamental freedom in America. We are not afraid. Where is the fear? We meet it, where is fear? We defy it, we ask your honor to admit the evidence as a matter of correct law, as a matter of sound procedure and as a matter of justice to the defense in this case.[107]

The trial transcript records that the speech was followed by "profound and continued applause."

Scopes was with Bryan and Malone in the courtroom immediately after Malone's speech. He recalls when the three of them remained behind in the courtroom

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[106]Scopes and Presley, 166.

[107]Trial., 187-88.

> Bryan was sitting alone in his rocking chair by the prosecution's table. As he tried to cool himself, he would let the palm leaf fan drop and then he would stare at a spot in front of him. I was sitting with Malone at the counsel table. Bryan, without turning, said "Dudley, that was the greatest speech I have ever heard!"
> "Thank you, Mr. Bryan," said Malone quietly. "I am sorry it was I who had to make it."[108]

According to Scopes and Curtis, the judge failed to control Bryan, not Darrow. And Bryan was not passive. Scopes' account in D-Days at Dayton gives a more complete description of the episode; one that contradicts Ginger's conclusions. Scopes describes "the events that took place on the afternoon of the famous examination of Bryan by Darrow" explaining:

> the transcript clearly outlines what happened but does not include all that occurred. A court reporter cannot record what two people are saying at the same time, much less what six or seven screaming individuals are saying simultaneously.[109] As soon as Bryan was called to be the defense's expert witness on the Bible, the Judge, Tom Stewart, the Hickses, and other members of the prosecution team present were waving their arms and shouting objections. Bryan was up and talking but, unlike the others, he was trying to restore order. It was obvious that the Judge did not intend to permit Bryan to take the stand; when Bryan had restored order, however, he pleaded to be allowed to testify.[110]

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[108]Scopes and Presley, 155. See also D-Days at Dayton, 27 where Scopes remembering that Malone had served under Bryan in the State Department when Bryan was President Wilson's Secretary of State recounts that Malone "spoke quietly to his old chief, 'Thank you, Mr. Bryan; I am terribly sorry that I was the one that had to do it.' It all seemed plain to me" said Scopes, "Bryan was crushed."

[109]The trial record discloses many instances in which the judge allowed multiple attorneys to speak to an issue hopefully not all at once as recorded here.

[110]D-Days at Dayton, 27.

The rest is history.[111]

VINDICATION

There is no doubt that had the trial ended without Bryan testifying it would have left a much different legacy. That Judge Raulston allowed Darrow's examination of Bryan to begin and failed to stop it sooner is his judgment to bear. Another of his judgments became the way out of the case for Tennessee. When Judge Raulston set Scopes' fine instead of having the jury set it, he violated Tennessee's Constitution.[112] The defense did not raise the question. They needed a conviction of their client in order to appeal. The entire aim of the ACLU was to obtain a favorable ruling on the constitutional questions from a higher court, the U.S. Supreme Court, if need be. As the prevailing party, the state had no reason to raise the fine issue on appeal. The Tennessee Supreme Court came up with this ground for reversal on its own, although all the parties acquiesced in the procedure at trial. Because of the trial judge's mistake in setting the fine, the high court was enabled to end the life of the case and prevent review of the case by a higher court. This was classed as a brilliant judicial maneuver. Dudley Field Malone called it "a typical country lawyer's trick."[113] Word from the defense camp through Arthur Garfield Hays acknowledged that "we are dealing with

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[111]The actual exchange between Darrow and Bryan may be found in The World's Most Famous Court Trial, 284-304.

[112] Tenn. Const. Art. VI, Sec. 14. "No fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, if they think the fine should be more than fifty dollars."

[113]L. Sprague de Camp, 471.

astute church people in that case, and I guess we did not credit them with the astuteness that they really possessed."[114]

If not intentional, it was a merciful mistake for the judge to make. In the realm of speculation, Hays may have been alluding to Judge Raulston, a lay preacher in the Baptist Church,[115] when he referred to the defense "dealing with astute church people in that case." One can imagine the scene passing through Hays' mind as he recalled the almost too pat exchange between General Stewart and the judge and, if he were of a suspicious nature, concluding that the defense had been done in by the trial judge who knew something the defense did not. Reading the record cold today, the Attorney General's exchange with the judge is like the two of them waving to look here for reversible error.

Presumably, the trial judge was aware of the law. In any event, General Stewart pointed the court in the right direction, declaring at the time "but I had it in mind that it would be the duty of the jury to fix whatever fine was imposed."[116] Judge Raulston replied: "As I understand the holding, the court can impose a minimum fine always under

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[114] Ibid.; Ginger, 209. Arthur Garfield Hays did not reiterate the charge in his book Let Freedom Ring (New York: Boni and Liveright, Inc., 1928), 25-79.

[115]Ginger, 69. Both Ginger and de Camp (p. 84) say Raulston was a member of the Methodist Episcopal Church, but a Raulston relative denied this and told R.M. Cornelius that Raulston was a Baptist.

[116]In a May 7, 2005 conversation with Tom Stewart's son Lawrence F. Stewart, a retired chancellor, when asked if his father had ever indicated whether Raulston knew he was wrong to set the fine he answered "No, he just got in a hurry and made a mistake." The chancellor remembered that as a youngster he had come across a desk drawer in his dad's office filled with correspondence, he asked if it was from the Scopes case. His dad responded that it was and that Scopes was the most full of foolishness case he had ever handled. Later his father discarded everything in the drawer.

our statute." Because, said the judge, "that is our practice in whiskey cases, the least fine in a transporting case is $100.00."[117] Is it beyond credulity that if Judge Raulston wished to leave young Scopes with no conviction and no fine he would do such a thing as intentionally commit error? Or as Kirtley Mather theorized, "as the judge rambled on, the thought may well have occurred to him that this technical error would make it unnecessary for the higher court to pass upon the constitutionality of the statute and chastise the state legislature by finding it unconstitutional."[118] The possibility is intriguing. Trial judges sometimes make certain that a case turns out right. It is worth noting that in later years Judge Raulston publicly expressed his opinion that the teaching of evolution in schools was not a proper subject for government regulation.[119] But what about Judge Raulston and the Tennessee Supreme Court? Did that court surprise Judge Raulston as it did the defense team when it reversed Scopes' conviction or is Mather's theory correct?

[117] Trial., 312.

[118] D-Days at Dayton, 87.

[119] D-Days at Dayton., 77. W.C. Curtis referring to news reports he had clipped. In 1950, when Raulston was eighty-one, L. Sprague de Camp says he was interviewed by the United Press which reported him as saying that Tennessee's Butler Act "should be enforced." But in 1956, shortly before his death, de Camp says that a Boston Newspaper quoted him "as having concluded that such matters as evolution should not be the subject of laws." de Camp, 481. It is not likely the judge would publicly acknowledge his chicanery if he had knowingly set the plate for the Supreme Court to reverse the case.

Larson, in his book Summer for the Gods, says that since "both parties had accepted this procedure at trial and neither raised it on appeal," this "should have settled the issue."[120]

In another of his books, Trial and Error,[121] he concludes that "Malone's immediate charge of 'a subterfuge on the part of the State of Tennessee to prevent the legality of the law under which Scopes was convicted being tested' appears well founded."[122]

An investigation of Tennessee's Constitutional provision against judge set fines and of the applicable Tennessee cases relied upon by Judge Raulston and the Tennessee Supreme Court in Scopes reveals that the high court's decision reversing Scopes' conviction rests upon sound constitutional principles, not subterfuge.

The Tennessee Constitution is plain. Article VI, sec.14 says that "no fine shall be laid on any citizen of this State that shall exceed fifty dollars, unless it shall be assessed by a jury of his peers, who shall assess the fine at the time they find the fact if they think the fine shall be more than fifty dollars." This principle flowed from the English bill of rights which declared that "excessive fines ought not to be imposed."[123]

The key to understanding the Court's application of this constitutional provision is to understand that the Supreme Court treated it as jurisdictional.

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[120]Larson, 220. Darrow agreed not to take an exception to the procedure. Responding to Stewart's suggestion that the jury fix the fine Darrow said: "either way you want it , because we want the case passed on by the higher court, if you want the jury to fix the fine." Darrow should have accepted Judge Raulston's offer to agree that "The jury might fix the fine." Judge Raulston told Darrow that the higher court "will not make any question about that." Trial., 312.

[121]Edward J. Larson, (New York: Oxford University Press, 2003).

[122] Ibid., 71.

[123] France v. State, 65 Tenn. 478, 485 (1873).

In 1873, the Tennessee Supreme Court upheld the imposition of a statutory fine of $500.00 for selling a lottery ticket. In France v. State, the court concluded that Article VI, sec. 14 did not apply "where the Legislature has peremptorily fixed the fine at five hundred dollars in every case."[124] In such a case, the jury's finding of guilt as a consequence fixed the fine. Justice Turney dissented. He would have held the statute an invalid exercise of legislative power. He believed "the makers of the Constitution recognized the fact that no power in the land could enforce the law against crime except the courts," which is why Article VI, the judicial article of the constitution, contains the prohibition against excessive fines.[125]

Then in 1913, in Metzner v. State,[126] the State Supreme Court held that juries alone, not the trial judge, had jurisdiction to set a fine in excess of $50.00 and that "no waiver or consent of the parties can be invoked to endow a judge with this jurisdiction."[127] Justice Green, writing for the court, stated that "while it is settled in this State that a defendant in a misdemeanor case may waive a trial by a jury [as Metzner had done], we do not think by such a waiver he can confer on the judge power or jurisdiction plainly withheld from the judge by the constitution." The Court elaborated that:

> It is a maxim in the law that consent can never confer jurisdiction, by which is meant that the consent of parties cannot empower a court to act upon subjects which are not

[124] Ibid., at 486.

[125] Ibid., 487-8.

[126] 128 Tenn. 45, 157 S.W. 69 (1913).

[127] 128 Tenn. at 47, 157 S.W. at 70.

> submitted to its determination and judgment by the law. The law creates courts, and upon consideration of general public policy defines and limits their jurisdiction, and this can neither be enlarged nor restricted by the act of the parties.[128]

In short, three principles apply where subject matter jurisdiction of a court is an issue in Tennessee (1) subject matter jurisdiction cannot be waived by the parties[129] (2) the parties cannot confer subject matter jurisdiction by their consent and (3) absence of subject matter jurisdiction can be raised at any time during a proceeding by any court on its own initiative.[130]

The anomalous decision[131] in Tennessee's approach to judge set fines in excess of fifty dollars occurred when the Tennessee Supreme Court decided State v. Green,[132]

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[128] Ibid.

[129]In State v. Durso, 645 S.W. 2d. 753, 759 (1983), the Tennessee Supreme Court rejected subject matter jurisdiction analysis and treated the constitutional right to freedom from excessive fines as a personal right of the accused (citing France v. State), which the accused may waive. The court overruled Metzner and its progeny to the extent their holdings limited the right of the accused to waive the protections afforded by Article VI, section 14.

[130] This was the rule when Scopes was tried. See In re: Lumber and Mfg. Co. , 141 Tenn. 325,330, 210 S.W. 639,640 (1919)(citing the United States Supreme Court case of Penn. R. R. Co. v.International Coal Co., 230 U.S. 184). The rule remains the law. Current Tenn. R. App. Proc. 13 (b) says an appellate court " shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review" by the parties and Tenn. R. Civ. Proc. 12.08 (2) provides "that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

[131]As a 1950 panel of Tennessee Supreme Court justices explained while upholding Johnson v. State, Upchurch v. State and Scopes v. State: "At first blush, it seems rather foolish to reverse and remand this case because the Judge rather than the jury 'laid' as a fine the smallest amount that the jury would have been allowed to assess upon a finding of guilt. Nevertheless, such action upon the part of the judge, though at the request of the defendant, was an unintentional violation of the plain mandate of the constitutional provision. . . It is common knowledge that often 'a little trend goes a long way.'"

"Moreover, the trial judge in assessing a fine of more than $50.00 exceeded his jurisdiction. When jurisdiction is affirmatively withheld it cannot be conferred by consent". . .

a case in which the trial judge imposed the minimum fine of $100.00 upon a defendant convicted of unlawfully transporting intoxicating liquors. After citing with approval the principles laid down in Metzner v. State and France v. State, the Supreme Court said:

> It cannot be doubted that the amount of the fine to be imposed . . . would be controlled by the principles upon that subject stated in Metzner v. State, and evidently recognized in France v. State. However, the trial judge, in fixing the fine, fixed it at the minimum sum of $100.00. This is the least sum that the jury could have imposed. . .
> While it was error for the court to assess the fine without submitting the question to the jury, it is not reversible error, because he exercised his assumed power for the benefit of the [one fined].[133]

The Court concluded that "it would be useless to reverse and remand the case, with directions to submit the question of the amount of the fine to a jury, because the jury could not reduce it to less than $100.00."[134]

Judge Raulston no doubt relied upon the holding in State v. Green when he set the fine of Thomas Scopes. He charged the jury based on the holding of that case that

> if after a fair and honest investigation of all the facts you find the defendant guilty and find that his offense deserves a greater punishment than a fine of $100.00, then you must impose a fine not to exceed $500.00 in any event. But if you

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"so, a jurisdictional question as well as a constitutional question is involved." The Court concluded that these factors seem "to have been overlooked in the subsequently overruled case of Green v. State." Thompson v. State, 190 Tenn. 492, 496-7, 230 S.W. 2d 977, 979 (1950) (superceded by State v. Durso, 645 S.W. 2d 753 (1983)).

[132]129 Tenn. 619, 167 S.W. 867 (1914).

[133]129 Tenn. at 622-3, 167 S.W. at 868. The Court said it could not "reduce the fine to the sum of $50, because the legislature has fixed the minimum fine at $100." Ibid. This holding must be distinguished from the Court's holding in Blackwell v. State, 153 Tenn. 319, 283 S.W. 986, where the Court upheld a fine the trial judge set at $50 which was below the statutory minimum.

[134]129 Tenn. at 623, 167 S.W. at 868.

> are content with a $100.00 fine, then you may simply find the defendant guilty and leave the punishment to the court.[135]

But the Court in the Green case had also held it to be clear error for the judge to set the fine. It was just not reversible error in that case said the Court. At the very least, Judge Raulston committed known error by setting the fine in Scopes. Under State v. Green, it would be up to the Supreme Court to treat it as reversible error or not in a non-whiskey case. And there was even more reason for Judge Raulston to be cautious about relying on the result in State v. Green. Before Judge Raulston began the trial, the Tennessee Supreme Court was reconsidering its holding in State v. Green.

A month before the start of the Scopes trial, the Tennessee Supreme Court issued its decision in Johnson v. State, a case involving the State's Bone Dry Law.[136] As would later occur in Scopes, the fixing of the fine by the judge was not assigned as error and the parties acquiesced in the $250.00 fine set by the judge. Nevertheless, the Supreme Court reversed for the judge's violation of Article VI, section 14. Noting that the fine exceeded the $100.00 minimum so that State v. Green was not in point, the

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[135]Trial., 310-11.

[136]152 Tenn. 184, 274 S.W.12 (issued June 6,1925). The case is superceded by State v. Durso, 645 S.W. 2d 753,759 (Tenn. 1983) (holding that "Metzner v. State and its progeny are no longer binding in so far as they hold that the provisions of Article VI, section 14, are limitations upon the power of the trial court which cannot be waived by an accused"). The Court noted that the Scopes case did not involve waver of trial by jury. 645 S.W. 2d at 756. Also, the Court in its June 5, 1926 decision in Blackwell v. State, 153 Tenn. 319, 283 S.W. 986 relied on State v. Green and distinguished its holding in Johnson v. State. The Court refused to reverse the defendant's conviction of violation of the liquor law where the judge set a $50.00 fine saying that the $100.00 fine in Johnson v. State violated a constitutional provision requiring reversal but that "in the instant case no constitutional right was involved." 283 S.W. 987. Therefore, under the holding in Blackwell v. State, if Judge Raulston had set a $50.00 fine instead of the statutory minimum fine of $100.00, Scopes' conviction would have been upheld.

Court said that it did not approve of a trial judge's violation of a constitutional provision and that "errors affecting constitutional rights call for a reversal."[137] The Court in Johnson held "that a fine may not be lawfully fixed for a violation of these liquor laws by the judge without a jury verdict." The court added that if the judge had set the $100.00 minimum fine "State v. Green . . . holding the error not reversible, might have been in point, although such practice, involving a violation of a constitutional provision is not approved."[138]

Finally, on March 27, 1926, after the Scopes trial but before oral argument of the case in the Supreme Court, May 1926,[139] the Tennessee Supreme Court reversed itself and abandoned its holding in State v. Green. In Upchurch v. State,[140] the Court ruled

> We cannot adhere to the result in State v. Green . . . where the court refused to reverse because the jury could not reduce the fine below the minimum fixed by statute. . . The citizen is entitled to the benefit of the protection afforded by the constitution.[141]

The defense should have known that the judge fine issue was viewed by Tennessee courts as one involving the subject matter jurisdiction of the court. Considering the France, Metzner, and Green line of decisions defense counsel should have understood that the judge was on somewhat uncertain judicial terrain when he took the minimum fine issue from the jury. At least they could not be certain that the result in

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[137]152 Tenn. at 188, 274 S.W. at 13.

[138] Ibid. (emphasis added).

[139]Larson, 214.

[140]153 Tenn. 198, 281 S.W. 462 (1926).

[141]153 Tenn. at 205, 281 S.W. at 464.

State v. Green would be extended to non-whiskey cases. The resulting reversal and dismissal of the Scopes case could have easily been avoided by the defense at the trial court level. Attorney John R. Neal, Tennessee counsel for Scopes, is most responsible for the blunder as it involved Tennessee law. [142] The fifty dollars fine clause of Article VI, section 14 is unique to Tennessee Law. "No other provision like it may be found either in the Federal Constitution or in any other modern state constitution."[143] But Darrow's success in questioning Bryan also contributed to the lapse.

At this moment in the trial, after Bryan's poor performance on the witness stand, the defense team got in a hurry. Malone and then Darrow had bagged Bryan, their prey, twice now for the defense in the case although Bryan's testimony was ordered stricken from the record by Judge Raulston. The defense did not wish for another encounter with Bryan. They did not want to give Bryan an opportunity to mitigate his situation in a summation of the case on the record. The defense wisely chose to avoid playing to Bryan's strength as an orator which suited him best for such a summation speech.

[142]Attorney Neal's neglect also deprived the defense of the expert witness issue. He failed to timely file his bill of exceptions with the Supreme Court. Larson, Trial and Error, 229 note 58. Neal is an interesting character. According to Rhea County General Sessions Judge Jim McKenzie, grandson of trial counsel Ben McKenzie, John R. Neal was known as a brilliant legal scholar as evidenced by his drafting the Tennessee Valley Authority Act and starting his own law school, but he was also an eccentric with a habit of being easily distracted and forgetful. Once, when searching his coat pocket for a missing document, he produced instead a stale ham sandwich which he had earlier misplaced.

[143]City of Chattanooga v. Davis, 54 S.W. 3d 248, 257-58 (Tenn. 2001) and 70 Tenn. L. Rev. 887 (Spring 2003), Doug Hamill, The Fifty-Dollar Fines Clause Re-emerges After Thirty-five Years Of Slumber."

While Bryan's involvement in other parts of the trial was neither planned nor expected by Bryan beforehand, Bryan was prepared for summation,[144] and the defense knew it. That Bryan would be effective, Darrow did not doubt.[145]

Therefore, to avoid Bryan's summation speech, Darrow urged a perfunctory ending to the trial and did everything short of pleading Scopes guilty to get a quick verdict against his client. In doing so, the defense sought to avoid a hung jury or a not-guilty verdict. If the jury were to deadlock over the fine, or refuse to fine Scopes altogether, the defense aim of challenging the Butler Act's constitutionality in a higher court would be frustrated. Darrow asked the Court

> Let me suggest this. We have all been here quite a while and I say it in perfect good faith, we have no witnesses to offer, no proof to offer on the issues that the court has laid down here, that Mr. Scopes did teach what the children said he taught, that man descended from a lower order of animals

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[144]George Fort Milton in his article titled "The Story of The Last Message" states that "it was Bryan's steady intention during the course of the trial . . . to participate in that trial only to the extent of closing argument for the State," and "Bryan had been gathering authorities for some time to cite in his final speech." The Last Message of William Jennings Bryan (New York: Fleming H. Revell Company, 1925), 7.

[145]Few at the time doubted the impact Bryan's summation speech might have had on the trial. Although his last speech was published by many newspapers across the nation after Bryan's death in Dayton five days after the trial ended, "the effect was nothing, however, to what it might have been had he delivered it in person across the nation as was his plan," says Ferenc M. Szasz. "The Scopes Trial in Perspective," Tennessee Historical Quarterly, 30 (1971), No. 3, 288, note 3. But one must wonder what effect Bryan's deteriorating health had on him during the trial. No admirer of Bryan's, H.L. Mencken observed that he "grows more and more pathetic." "He has aged greatly during the past few years and begins to look elderly and enfeebled. All that remains of his old fire is now in his black eyes." D-Days at Dayton, 47- 48. Bryan was sixty-five years old and diabetic. Dr. Thomas Kelly of Baltimore, who had placed Bryan on a diabetic diet in 1914, wrote Bryan's daughter, Grace that, as he reviewed news photos of Bryan taken during the trial, he became "very apprehensive for him . . . it was very warm and he was looking very thin." The Dr. assured her that "Mr. Bryan died of diabetes mellitus, the immediate cause being the fatigue incident to the heat and his extraordinary exertions due to the Scopes trial." Koenig, 658.

> - we do not mean to contradict that, and I think to save time we will ask the court to bring in the jury and instruct the jury to find the defendant guilty. We make no objection to that and it will save a lot of time and I think it should be done.[146]

Following Darrow's closing speech of capitulation, General Stewart summarized the defense position for the jury:

> What Mr. Darrow wanted to say to you, was that he wanted you to find his client guilty, but did not want to be in the position of pleading guilty, because it would destroy his rights in the appellate court.[147]

[146]Trial., 306.

[147]Trial., 312.

To let the judge rather than the jury set the fine would expedite the close of the trial and make certain the imposition of the fine by the court whereas there was uncertainty in the minds of the defense if the fine issue were to go to the jury . The immediate motivation for the defense's refusal to let the jury set the fine was the fact that the jury was not happy because they had been excluded from much of the trial. As Arthur Garfield Hays recalls, "indignant at their regular exclusion from the courtroom, many of them would have voted to acquit Scopes had there been the slightest loophole."[148] All this explains why Darrow, when he was offered the chance to have the jury fix the fine, after first being assured by Judge Raulston that a higher court "will not make any question about that," nevertheless replied "No." He did not want "to stipulate--the jury might fix the fine."[149]

Thus, Judge Raulston had given Darrow the option to have the jury fix the fine and he had refused to accept it. Darrow and the defense unwittingly maneuvered themselves out of achieving their primary objective while focusing on getting a guilty verdict against their client to keep the issues alive for review by a higher court. The uniqueness of Tennessee's constitutional prohibition against judge set fines in excess of $50.00, that led the defense to err in the trial, also led them to question the Scopes decision and impugn the motives of the Court that issued it. Based on the trial court exchange between the judge, General Stewart and Darrow, the defense allegation that the Tennessee Supreme Court engaged in subterfuge and legal legerdemain to rid itself of this troublesome case appears to be more of an excuse offered to exculpate them

[148] Hays, Let Freedom Ring, 77-78.

[149] Trial., 312.

from responsibility for their faulty trial decision than a valid complaint against the Court's handling of the legal precedents involved. Perhaps future commentators on the case will elaborate on the misunderstanding of the judge set fine issue in light of the applicable precedents upon which the Supreme Court relied, and the constitutional provision's clear mandate that required the jury to set Scopes' fine "at the time they find the fact" of his guilt, "if they think the fine shall be more than fifty dollars." Judge Raulston was incorrect first to charge the jury that "if you are content with a $100.00 fine, then you may simply find the defendant guilty and leave the punishment to the Court," and then to rule that

> The jury has found you guilty. The Statute makes this an offense punishable by not less than $100.00 nor more than $500.00. The Court now fixes your fine at $100.00 and imposes that fine on you.[150]

The Tennessee Supreme Court's decision on the fine was faithful to the constitutional mandate and consistent with its most recent statements on the issue. The timing of the Supreme Court's decision in Johnson v. State, which occurred before the facts of Scopes were developed at trial, shows that the Tennessee Supreme Court was questioning the soundness of its decision in State v. Green not to reverse for the judge's constitutional violation. In Upchurch v. State, before considering Scopes, the Court abandoned its holding in State v. Green. It should be noted that the people of Tennessee have retained this constitutional prohibition against allowing a judge to assess a fine of more than $50.00 though many other provisions have been changed since the Scopes case and the state has held constitutional conventions which updated

[150]Ibid., 313.

the state's constitution in 1953, 1965, and 1977. The interpretation of the $50.00 fines clause was changed in 1983, when the Tennessee Supreme Court reversed precedent and held the constitutional provision waivable by the accused in a criminal case who waived his right to trial by jury. The Court pointed out the decision did not affect their holding in Scopes because Scopes did not involve a waiver of the right of the accused to be tried by a jury.[151]

The Tennessee Supreme Court decision in Scopes, which vindicated the law by declaring it constitutional but avoided further victimization of Scopes in a new trial was also consistent with Governor Peay's expression of the legislative intent behind the act at the time of its passage, although the penalty provision of the Act spoke of a contrary intent. Courts are charged with honoring legislative intent. Nevertheless, in the view of the Tennessee Supreme Court, the Butler Act was applied as many thought it was meant to be applied and as the Governor believed it was intended - as a symbolic statement of the majority's beliefs but not worthy of enforcement by the State as a penal statute.[152]

But, in the eyes of the defense and those who desire a judicial declaration that anti-evolution laws are unconstitutional, the fact that the Tennessee Supreme Court

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[151]See note 134, supra.

[152] Governor Austin Peay noted that "it is the belief of our people and they say in this bill that any theory of man's descent from lower animals . . . because a denial of the Bible, shall not be taught in our public schools," but, the Governor assured everyone that the law "will not put our teachers in any jeopardy." Larson, 58; Ash, Messages of the Governors of Tennessee, 173-74. The Governor acknowledged that "this bill is a distinct protest against an irreligious tendency to exalt so-called science, and deny the Bible in some schools and quarters - a tendency fundamentally wrong and fatally mischievous in its effects on our children, our institutions and our country." Ginger, 7; Ash, 174.

overturned Scopes' conviction and declared his fine unconstitutional does nothing to vindicate the Court. The Court's decision was a monumental lost opportunity to settle the question once and for all. "The mountain has labored," wrote Robert S. Keebler shortly after the decision, "and brought forth a mouse." "The only thing actually and conclusively determined by the case was that the trial judge should have allowed the jury to fix the amount of the fine."[153]

Speaking as a representative of the defense team for whom he had served of counsel during the trial, Keebler regretted that the decision deprived them of their primary objective.[154] What mattered most to the defense then and what matters to many today who look back on the trial is the Court's failure to declare the Butler Act unconstitutional. The Court's bringing the case to an end with no way for the defense to appeal the issue of the constitutionality of the anti-evolution law of Tennessee seems unjust to them. But, against the charge, must be balanced the fact that the ACLU mounted no other test case in the wake of Tennessee's decision in Scopes and that it is debatable whether the United States Supreme Court would have reversed the Tennessee Court on the constitutional issue. If the ACLU seriously thought the highest court in the land would declare the Butler Act unconstitutional, they might have tried

[153]6 Tenn. L. Rev. 153, 173 No: 3 (April,1928) Robert S. Keebler, "Limitations upon the State's Control of Public Education: A Critical Analysis of State of Tennessee v. John Thomas Scopes."

[154] "It is unfortunate that the Supreme Court went outside the defendant's assignments of error and revoked the judgment of the lower court on a barren technicality of which the defendant did not desire to take advantage and which could not possibly have done the defendant any harm; and it is doubly unfortunate that the Court directed the Attorney General to nol. pros. the case, thereby cutting off the defendant's appeal to the Supreme Court of the United States and preventing a final and authoritative decision of the issues involved, not only for Tennessee but for all American States." Ibid.,158.

again but they had difficulty finding a willing defendant and certainly no success in finding a willing Tennessee prosecutor in light of the Supreme Court's admonition to dismiss in Scopes with which the State Attorney General concurred. Larson points out that a new action could not be brought on behalf of Scopes because he had voluntarily left his teaching position to attend graduate school.[155] Instead, the ACLU "announced in its 1932 annual report that it was dropping the issue," in part due to a failure of States to actively enforce their anti-evolution laws.[156]

RESERVATION

What affect did Judge Raulston's personal agenda have on the trial?

On one hand, as a devout Bible believing, Baptist, lay preacher who almost certainly personally favored the Butler Act, his ruling upholding the constitutionality of the Act obviously advanced his personal agenda. Few judges once donning the robe in a trial behave in such a manner as to make it obvious (least of all to themselves) that they are acting upon their personal prejudice. Judicial prejudice is usually subtle. But judge Raulston was observed to be too close to the case from its inception. He played too large a role in seeing that the case landed in his court. Once the case was before him, the fact that he enjoyed the sensationalism of the trial appeared to cater to his personal stake in the trial. Since his re-election could be aided only if he decided in favor of the statute, this left the judge open to criticism that his decision that the law was constitutional was a product of his personal prejudice and bias.

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[155]Larson, Trial and Error, 82, note 116.

[156] Ibid.

On the other hand, Judge Raulston acted contrary to his personal ambition for the trial when his legal rulings on the constitutionality of the law and the admissibility of expert witnesses established parameters for the trial which resulted in less, not more sensationalism. These decisions by the judge left the defense no alternative but to resort to attacks upon Bryan which the judge tried to thwart but which led to Bryan testifying in the most sensational development of the trial. This development, it is safe to say, the judge did not foresee occurring before the trial began.

Although Judge Raulston allowed Bryan to testify, it was not part of his personal agenda and not his plan for the trial. Rather, he had planned for an open airing of real experts from both sides. His ruling against the defense on the expert witness issue prevented the experts from testifying, which was contrary to the wishes he expressed when he calendered the case so that he could allow "scientists, theologians and other school men" to "be able to act as expert witnesses."[157] Judge Raulston deserves credit for his willingness to depart from the more wide open trial he personally wished to occur. When faced with the evidentiary issue, he made the correct ruling and he preserved the record for appeal by correctly allowing the defense their offer of proof. And he allowed the defense to put their expert proof in the record by affidavit as they chose to enter it into the record. Whereas trial testimony subject to cross-examination would have been more sensational and would certainly have prolonged the trial and his time in the limelight.

The trial became much more narrowly focused than Judge Raulston anticipated it would because of Attorney General Stewart's direction of the prosecution and the prosecution's plan to keep the trial focused on the issue of Scopes' violation of the

[157]Note 15, supra.

statute. The grand stand play by Bryan and Darrow at the end of the trial, while more in line with Judge Raulston's pre-trial expectation, was not orchestrated by him. His loss of control of the proceedings once Bryan and Darrow got their way was not intentional. The Judge allowed Bryan to testify after the defense called for it only grudgingly and because Bryan demanded that he be allowed to do so not because the judge thought it a good idea.

Trials with competent counsel on both sides are not shaped by the trial court judge as much as they are shaped by the attorneys who put the issues to the court and jury through their argument, evidence, and attitudes toward the process. This is true of Judge Raulston and the Scopes trial.

A trial judge doing his job well strives to give the parties a full and fair hearing while also protecting the record from errors of law. Judge Raulston performed these basic duties admirably but not perfectly. But it was attorney error, not judicial error, that caused the defense's failure to preserve the expert evidence issue for review by the appellate court.[158] And although Judge Raulston committed reversible error, it was Darrow's error of judgment in opting for the judge rather than the jury to set the fine that ultimately sealed the case from further judicial review.[159] The judge correctly identified the safest procedure but let Darrow decide.

Judge Raulston showed a good amount of judicial restraint in dealing with Darrow's contempt and in allowing counsel for both sides considerable latitude in the way they chose to present their respective sides of the case. He blundered by letting Bryan

[158]See note 142, supra.

[159]See text, supra, pp.48-51.

testify as he explained due to his "over-zeal to be absolutely fair to all parties" not due to any prejudice.[160] W.C. Curtis, reading the record forty years after the trial, concluded that "Judge Raulston was not so partial as we [of the defense] thought" at the time.[161] This is persuasive testimony to the fact that Jude Raulston in the trial acted with due regard to the heavy burden he carried as presiding judge.

Even so, two vastly different versions of the trial emerged as the trial ended - Darrow's and Bryan's. Judge Raulston, no doubt, would agree more with Bryan's view of the trial's meaning than he would Darrow's conclusion that the trial had been nothing more than a witch hunt.

DARROW'S VIEW

Unfortunately for Judge Raulston, Darrow's vision of what had happened in Dayton would become embedded in the public mind. To the extent that the public's perception of the trial is as it was cast in the 1960 movie Inherit the Wind, a trial that never was has entered the social consciousness of the country, and made Darrow appear exquisitely accurate when he predicted the way the case would be viewed by future generations.

> I think this case will be remembered because it is the first case of this sort since we stopped trying people in America for witchcraft because here we have done our best to turn back the tide . . . of testing every fact in science by a religious dictum.[162]

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[160]See note 86, supra.

[161]See note 105, supra.

[162]Trial., 317.

Judge Raulston never intended to enter the social consciousness of the county in a role similar to that of the judges of the Salem witchcraft trials of seventeenth century colonial America as Darrow suggests. In fairness to the judge, Darrow's view loses weight upon closer examination of the trial and its afterlife. The fact is that in contemporary America, the role of religion in American life and its presence in the public forum is impressively strong and arguably necessary to the continued recognition of individual rights. Also, considerable resistance to the social implications of the Darwinian view of man's origin remains in the American psyche. The reality of these two conditions calls into question Darrow's conclusion about the meaning and legacy of the trial. This is so in spite of the fact that in the eighty years since the Scopes trial, judicial decisions of the United States Supreme Court have excised from the public school environment many vestiges of the culture of belief that were commonplace at the time of the trial. The Court banned most forms of religious instruction in public schools in 1948,[163] school prayer in 1962,[164] and Bible reading in 1963.[165] In 1987, the Court forbade the teaching of creationism alongside evolution in science classes.[166] Justice Scalia called the case "Scopes - in - reverse."[167] However, no court ever declared the Butler Act unconstitutional. It remained the law in Tennessee until its repeal by the Legislature in

[163] McCollum v. Board of Education, 333 U.S. 203 (1948).

[164] Engel v. Vitale, 370 U.S. 421 (1962).

[165] Abington Township School District v. Schempp, 374 U.S. 203 (1963).

[166] Edwards v. Aguillard, 482 U.S. 578 (1987).

[167] Ibid., 634.

1967.[168] The next year, the United States Supreme Court declared anti-evolution laws like the Butler Act unconstitutional attempts to establish religion when it struck down Arkansas's anti-evolution statute in Epperson v. Arkansas.[169] Concerning the taxpayer's right to say what may be taught, in 2002, the United States Supreme Court agreed that taxpayers are free to choose to subsidize the choice of parents to send their children to religious schools so long as the voucher program remains neutral toward sectarian and secular groups.[170]

RELIGION IN AMERICAN PUBLIC LIFE

The important point to note is that it remains open to debate, in the public mind at least, whether the repression of religious conduct and speech and their isolation from the public school forum is a good thing and whether it makes us a more free or a less free society. The conclusion of each individual on this issue probably depends upon whether the individual is or is not "religious" in the sense that religious beliefs hold authority over the individual's daily life and conduct.

In the political philosophy of the nation's founders, because the individual's duty to religious authority was deemed to be dictated by individual "conscience" not "choice," an individual's religious belief "is not governed by the will" of the individual and, therefore,

[168]Tennessee Public Acts, Chapter 237, p. 627 (1967).

[169]393 U.S. 97 (1968).

[170]Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

religious belief is afforded special protection under the Bill of Rights.[171] The founding fathers protected the individual's right to freedom of "conscience" by the First Amendment.

Even today, it is wrong to conclude that the United States Supreme Court rulings have decreed "that religious expressions of any type" in the public schools "is either inappropriate, or forbidden altogether." As President Clinton's executive Memorandum on Religious Expression in Public Schools stated so well, "Nothing in the First Amendment converts our public schools into religion free zones, or requires all religious expression to be left behind at the schoolhouse door." The decisions of the Supreme Court have "reaffirmed" this said the President. The Court's decisions mean only that "while the government may not use schools to coerce the consciences of our students, or to convey official endorsement of religion, the government schools also may not discriminate against private religious expression during the school day."[172] The problem the President and many other commentators have observed is that overzealous "school officials, teachers, and parents" have mistakenly interfered with the student's right "to private religious expression during the school day" as well as permissible expression of the student's religious beliefs in written and oral assignments.[173] The individual pupil's

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[171]Michael J. Sandel, Democracy's Discontent (Cambridge, Mass.: The Belknap Press of Harvard University Press, 1996), 65-6. "It is precisely because belief is not governed by the will that freedom of conscience is inalienable," and can not be coerced. Ibid.

[172]"Memorandum for the U.S. Secretary of Education and the U.S. Attorney General," July 12, 1995.

[173]Ibid. In February of 2003, through a U.S. Department of Education Guideline issued pursuant to the "No Child Left Behind Act," the Federal Government made federal funding of state supported education contingent upon public school observance of guidelines on constitutionally

freedom of conscience must be respected even when conscience collides with the teaching of Darwinian concepts of man's origin in the public school classroom.

That religious belief is a matter of conscience, not choice, though strange to the modern mind, is a principle Jefferson set forth in his 1779 draft of a bill for establishing religious freedom in Virginia. In the very first sentence he began - "Well aware that the opinions and beliefs of men depend not on their own will, but follow involuntarily the evidence proposed to their minds."[174] While no one today debates the merits of the Salem Witchcraft Trials, this concept (that the truth has the power to spur the conscience and compel the individual's mind to its conclusions about various truth claims) helps answer the question: why the public debate of the issues raised by the Scopes trial continues today.

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protected prayer and religious exercises in elementary and secondary schools. The text of the directive may be found on the U.S. Department of Education website my.ed.gov. under Religion and Public Schools.

[174] Ibid., p.65. This language was deleted from the draft of the bill approved by the Virginia Legislature January 16, 1786. Compare Va. Code Ann. §57-1 (2006) and Swaney, 204. Sandel also cites John Locke's Letter Concerning Toleration (1689), 46. "And to believe this or that to be true, does not depend upon our will."

AMERICA'S CONTINUED RESISTANCE TO THE DARWINIAN IMAGE OF MAN

The idea that some opinions are not chosen so much as they are directed by conscience helps explain why the people's belief in creationism remains strong in spite of scientific, cultural, and legal developments since Scopes. The NBC Nightly News reported in March of 2005 that "Creationism beats Darwinism nearly 2 to 1." The March 21, 2005, poll revealed that when asked which was the "more likely explanation for life," fifty-seven percent said creation. Of the entire sample, forty-four percent believed creation was in six days. Evolution was held to be the more likely explanation for life by thirty-three percent of the responders.[175]

The power of conscience over volition can also explain why many evolutionists are not whole-mindedly devoted to the Darwinian image of man as just another animal on the planetary zoo called earth. Speaking to this group, Stephen Gould, a leading spokesman for evolution science, chided his fellow believers in the evolutionary theory of origins for their "unwillingness to face the implications of Darwinism." He accused them of spin doctoring Darwinism to such a degree that "public perception of evolution" has "managed to retain an interpretation of human importance scarcely different, in many crucial ways, from the exalted state we [humans] occupied as the supposed products of direct creation in God's image."[176] Gould correctly noted the reason for the spin doctoring of the implications of Darwin's view of man is that no "other ideological revolution in the

[175] NBC News (Creationism beats Darwinism nearly 2:1), March 21, 2005<http://lexis. com> A public opinion strategies (R)/Peter Hart Research (D) Poll conducted 3/8 -10; Surveyed 800 adults nationwide margin of error +/- 3.5 %.

history of science has ever so strongly or directly impacted our view of our own meaning and purpose."[177]

As Gould's comments make clear, not all believers in evolution as the explanation for life also believe, write, and speak of it as though man is no different in kind[178] than other animals. One suspects there remains an idealistic truth in the psyche of Gould's

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[176]Stephen Jay Gould, "Spin Doctoring Darwin," Natural History, July 1995, p. 6.

[177]Ibid.

[178]The disagreement among evolutionists over materialistic versus spiritual explanations of the nature of man dates back to Wallace and Darwin both of whom, in1858, in papers before the Linnean Society, introduced natural selection as the mechanism of species change. Wallace, who is credited with suggesting to Darwin that he use Herbert Spencer's phrase "survival of the fittest" to describe the fundamental idea of natural selection, writes in his autobiography, My Life, volume two, p. 17, 1905:

> On this great problem the belief and teaching of Darwin was that man's whole nature - physical, mental, intellectual, and moral - was developed from the lower animals by the means of the same laws of variation and survival, and as a consequence of this belief, that there was no difference in kind between man's nature and animal nature, but only one of degree. My view, on the other hand, was, and is, that there is a difference in kind, intellectually and morally, between man and other animals, and that while his body was undoubtedly developed by the continuous modification of some ancestral animal form, some different agency, analogous to that which first produced organic life, and then originated consciousness, came into play in order to develop the higher intellectual and spiritual nature of man.

The above is drawn from Sir Alister Hardy, Darwin and the Spirit of Man, (London: Collins, 1984) pp.76-7. Sir Alister argues that it is time and "it must be so" that the "so-called spiritual element in man can be a part of the system of evolution." Ibid. p.229. He decries the fact that "A large section of the public, including some of the best brains, has been convinced by the work of molecular biologists that the neo-Darwinian doctrine of today is pointing only to a materialistic interpretation of life." Hardy described himself as "an ardent neo-Darwinian, but" also one who "all my life . . . have been one of those who has had a sense of spiritual awareness." He boldly suggests how "the Darwinian doctrine might be altered - or added to . . . to bring about a reconciliation between the two outlooks." Ibid.

wavering ones that overrides the expected materialistic truth of science where the image of themselves and of mankind is concerned.

On a broader scale of influence in favor of a non-Darwinian view of man is the fact that our government that in it's public schools supports the teaching of the scientific fact that man descended from the lower animals was itself formed from the idealistic belief that man is not just an animal descendant but a created being endowed by the Creator with inalienable rights. The American Declaration of Independence has not been repudiated officially nor in the popular mind. How could it be? It remains America's tract of freedom to the world. Speaking for the people, the Declaration says "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the pursuit of Happiness."

Thomas Jefferson doubted whether the liberties and rights of man that he invoked in the Declaration of Independence could endure unless the people viewed them as the gift of God.[179] The principles of liberty and equality laid down by Jefferson in these words of the Declaration of Independence are important and potent rebukes to tyranny today just as they were 150 years ago when the people went to war rather than allow

[179]Thomas Jefferson, Notes on the State of Virginia, 1782, Query XVIII. Jefferson asked: "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God? That they are not to be violated but with his wrath?" "Indeed I tremble for my country." Jefferson saw with foreboding the withholding of liberty from the slave when he said "I reflect that God is just: that his justice cannot sleep forever" and that "The Almighty has no attribute which can take side with us [Virginia] in such a contest" between slave and master. (Underlined emphasis added).

these principles to be repudiated. On the eve of that war Abraham Lincoln wrote in praise of these words of the Declaration that

> The principles of Jefferson are the definitions and axioms of a free society and yet they are denied and evaded, with no small show of success. One dashingly calls them "glittering generalities." Another bluntly calls them "self-evident lies" and still others insidiously argue that they apply to "superior races."
> . . . All honor to Jefferson -- to the man, who in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and sagacity to introduce into a merely revolutionary document an abstract truth, applicable to all men and all times, and so to embalm it there that today and in all coming days it shall be a rebuke and a stumbling-block to the very harbingers of re-appearing tyranny and oppression. [180]

In spite of the triumph of Darwinian science in other spheres, it is natural for a people grappling with the question of the source of their liberty to ask - if not the gift of a benevolent Creator, then where do the people's "fundamental liberties" originate, and to reason that if the people's liberties originate, not from a Higher authority, but from mere judges of the courts or any other man made authority, then they may be taken away whenever the one with power chooses to do so. Liberty born of the will of man is certainly not "inalienable" as Jefferson postulated and is no stumbling-block or rebuke to tyranny as Lincoln lauded. Rather it is an invitation to tyrants to rule. No doubt, the American conception of a free people in a free society as ordered by a Creator God remains a serious barrier to the fusion of Darwinism into the public psyche.

[180]Lincoln's "Tribute to Jefferson," Lincoln to H.L. Pierce and others, Springfield Ill., April 6, 1859. Abraham Lincoln : His Speeches and Writings, Roy P. Basler ed. (Cleveland, Ohio: Dacapo Press, 1946), 488-9; and Swaney, 148-9.

BRYAN'S VIEW

As compared to Darrow's view of the trial's meaning and legacy, it must be remembered that Bryan championed human dignity and an elevated image of man at Dayton. To Bryan, testing the humanitarian dictates of one's religious conscience by every new fact of science or technology was just as dangerous as "testing every fact of science by religious dictum" was to Darrow. Bryan's warning about the harm that could be wrought from the application of Darwinism in the civil arena proved prescient. Within less than twenty years of the contest between Bryan and Darrow at Dayton, Hitlerism and Stalinism would demonstrate the real danger posed to the world's peoples by societies willing to subordinate humanitarian dictates of conscience to the Darwinian view of mankind.

Meanwhile, America chose Bryan's way during the crisis of the Great Depression a few years after the trial. Many Americans were saved by President Roosevelt's humane and careful implementation of social policies first championed by William Jennings Bryan and born of Bryan's conviction that the common people were entitled to the assistance of government in the struggle against economic oppression and exigency. Many of the economic social causes Bryan championed during his lifetime were taken up by President Franklin Roosevelt and his New Deal.[181] To understand why the trial raises issues many Americans are convinced remain important today, requires one to reject Darrow's partisan argument and to admit the evil lurking behind Darrow's Social Darwinism.

[181]Koenig, 129, 197, 430.

Before the play Inherit the Wind, the competition between the social solutions offered by the conflicting views of man championed by Bryan and Darrow in the 30's and 40's produced an American consensus in favor of William Jennings Bryan's view of the dignity of the common person. This triumph is true in spite of the fact that prohibition which Bryan favored was repealed in 1933 and the United States Supreme Court in Buck v. Bell, 274 U.S. 200, 207 (1927) upheld forced sterilization of those the State of Virginia deemed "feeble-minded." This is the case in which Justice Holmes declared "Three generations of imbeciles are enough." Sounding frighteningly like the social planning strategies of Nazi Germany, he explained "the public welfare may call upon the best citizens for their lives" and "it would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices . . . in order to prevent our being swamped with incompetence," and "instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." The case has been given the criticism it deserves.[182] No one on the political landscape then or now, argues against human dignity and social responsibility as Darrow did in his defense of Leopold and Loeb. To make such an argument today would be to defy our common understanding of what our government is all about - the recognition and protection of individual human rights.

Today, the teaching of evolution in public high schools which also teach Jefferson's Declaration of Independence is an example of the clash of authority within our culture that is characteristic of the culture war. The fact that the teaching of evolution in

[182]For example see Tennessee v. Lane, 541 U.S. 509,534 (2004) (J. Souter concurring opinion joined by J. Ginsburg).

public high school science classes is supported and creationism is banned by courts and government today and that the tenets of Scopes have been literally and judicially reversed has not ended the competition between the two truth claims struggling in the public mind to be believed. In light of this, Bryan's view of the meaning and legacy of the trial is worth remembering.

In his last words, Bryan addressed the trial's meaning and significance. What would be its future legacy? The significance of the trial for the future of the people was in raising an issue not in deciding it at Dayton. Resolution was reserved to the people and the future. Bryan told the court that "that issue will someday be settled right, whether it is settled on our side or the other side. It is going to be settled right." Bryan hoped that the trial had been instrumental in drawing the people's attention to the issue. Its value, said Bryan, lay in the fact that "there can be no settlement of a great cause without discussion, and people will not discuss a cause until their attention is drawn to it...the value of this trial is not in any incident of the trial" or "because of anybody who is attached to it." Bryan believed that no one in the trial, not the lawyers nor the judge, had the "power to define the issue finally and authoritatively." The issue was reserved to the people:

> The people will determine this issue. They will take sides upon this issue, they will state the question...they will examine the information - not so much what has been brought out here, for very little has been brought out here, but this case will stimulate investigation...the facts will be known, and upon

> the facts, as ascertained, the decision will be rendered...We ought not only desire, but pray, that that which is right will prevail whether it be our way or somebody elses.[183]

CONCLUSION

In spite of numerous court cases denying room in public school science classes for the concept of a Creator, it is obvious from the people's continued devotion to the concept of a creator God that belief in creationism does not need such government support to prevail in the public mind.

With the tables of the law turned on them, creationists today can make the same moral indictment of government power that Dudley Field Malone did in his speech which he borrowed from Thomas Jefferson who observed "It is error alone that needs the support of government. The truth can stand by itself."[184] However, some creationists would rather have the benefit of the government's legal rulings on their side than have Malone's argument that truth will prevail without the aid of government.

Consequently, just as the defense sought on behalf of evolution science in the Scopes trial, creationists seek to present public school students a creationist world view in science classes.

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[183] Trial., 316-7.

[184] Thomas Jefferson, Notes on the State of Virginia, 1782, Query XVII, "The different religions received into that State."

Understanding, as do the proponents of scientific evolution, that the efficacy of truth upon a culture depends upon its being believed[185] and concluding that public education is not and cannot be neutral[186] on the question of God or no God, creationists today support current efforts to enact "intelligent design" legislation. So the controversy continues as part of the broader culture war today long after the legal issues confronting Judge Raulston have been decided by the United States Supreme Court.

The Scopes trial may have been the culture war's beginning.[187] It certainly was not its end.[188]

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[185]Before creationism can be believed, it must be believed to be possible and plausible. Secular commentators have acknowledged that the "naturalistic and scientistic commitments of twentieth-century man" may irrevocably bar his acceptance of "the possibility that we live in a meaningful world." Michael Polyani and Harry Prosch, Meaning (Chicago: The University of Chicago Press, 1975), 159-60.

[186] See n.90, supra. Herzog, p. 1908. In this, like many other legal controversies confronting our Supreme Court today, the Court's professed neutrality seems to the creationist not to be the same as not "taking a position on underlying moral disputes." Creationists believe that neutrality on this issue, as Jeffrey Abramson observed about the Court's abortion rights jurisprudence, "is simply impossible." One must choose one set of values or the other and creationists expect courts to "make a substantive, moral argument in favor of one set of values or the other." Creationists have concluded that by excluding the idea of God from public school classroom scientific discussions of the origin of man, the Court has decided against their set of values while hiding behind a false neutrality principle that allows the Court to avoid any discussion of preferred values while choosing anti-religious values. The End of Tolerance, compiled by the Alfred Herrhausen Society for International Dialogue: (London: Nicholas Brealey Publishing), 2002 p. 106-07 from Jeffrey Abramson, article "Ideals of Democratic Justice."

[187]In 1929, not calling it a culture war but calling it "the crisis in contemporary culture," John Dewey wrote in The Quest for Certainty that "the crisis in contemporary culture, the confusions and the conflicts in it, arise from a division of authority. Scientific inquiry seems to tell one thing, and traditional beliefs about ends and ideals that have authority over conduct tell us something quite different." Dewey thought that the important concern should be "with finding how authentic beliefs about existence as they currently exist can operate fruitfully and efficaciously in connection with the practical problems that are urgent in actual life." Intelligence in the Modern World: John Dewey's Philosophy, Joseph Ratner ed. (New York: Random House, Inc., 1939), 308-310.

[188]See 64 La. L. Rev. 589 (Spring, 2004) Arianne Ellerbe, Comment: "We Didn't Start the Fire: The Origins Science Battle Rages On More Than 75 Years After Scopes."